THE

York Legal Record.

A Record of Cases Argued and Determined in the Various Courts of York County;

Together with Reports and Abstracts of the Most Important Cases adjudicated throughout the Commonwealth.

S. C. FREY, Editor.

VOLUME IV.

YORK, PA.
YORK LEGAL RECORD PRINT,
1884.

JURISPRUDENCE

TABLE OF CASES

REPORTED IN THIS VOLUME.

TABLE OF CASES

ABSTRACTED IN THIS VOLUME.

TABLE OF CASES

CITED IN THE COURTS' OPINIONS IN THIS VOLUME.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAR. 8, 1883. No 1.

ORPHANS' COURT.

O. C. of Adams Co.

Sander's Estate.

Will—Trust under—Executor.

When by will, a trust for a widow is annexed to the office of the executor, on his death it can only be exercised by an administrator d. b. n. c. t. a.

February 16, 1883. McCLEAN, P. J.—It can hardly be said that there is under this will a *distinct* and *collateral* trust and one which can be exercised independently of the executorship. There can be no separation allowed by the Will of the provisions for the widow. The *whole* existting estate is for her benefit. If she desires to have the real estate sold, the executor is ordered and directed to sell and convey the same. The conversion of it only awaits her desire. Then again not only the interest arising from the investments of personal estate and from the proceeds of "real estate if sold, is to be paid to the widow during her life, but if the interest is insufficient for her comfortable support, then so much of the principal to be applied to her support as shall be requisite for said purpose." The executor is not made a trustee *nominatum* but *ratione officii*. How can the office of a trustee in this case be distinguished or separated from that of *Executor?*

Would there be propriety in appointing a trustee of the *personal estate*, when it may be, part of the principal would be required for the support of the widow or when she can *at anytime* require the sale of the real estate?

Then if there could be an appointment of a trustee of *part* of the estate, excluding the real, the result would be that when the real estate is to be sold either during the life of the widow or after her death, by virtue of the authority given in the will, an administration must be raised.—It seems appropriate that letters of administration *de bonis non cum testamento annexo* should be issued.

Such a representative has the entire estate under his authority and is ready to dispose of it according to the provisions of the will and as occasion requires, and who will care for the interests of the residuary legatees, as well as of the widow.

In my judgment the testator did not intend an *imperium in imperio*, but on the contrary, oneness of power and authority in the care and administration of his entire estate for all the purposes named in his will. As has been intimated any and all trusts were vested by him in the Executor as such, and the trust cannot be severed from that office, *vide* opinion of Sup. Court in Innes' Estate, 4 Wharton p. 184. The testator appoints Henry A. Picking the sole Executor of the Will, and we have no testamentary trustee *nominatum* for the widow's benefit alone, no such testamentary trustee as is contemplated and intended by section 1 of Act 22 April, 1846, 1 Purd. 455 pl. 244; which is claimed to be the authority for the appointment now asked.

Section 3 of Act of 12 March, 1800, provides that when the Executor shall die, and letters of administration with the will annexed shall be granted, it shall and may be lawful for such administrators with the will annexed, to sell and convey the real estate and otherwise act, respecting the same, as fully and completely, as such deceased executor might or could have done, were he still living, and by the 67 section of the Act of 24 February, 1834, all and singular the provisions of that Act relative to the powers, duties and liabilities of executors are thereby extended to administrators with a will annexed; 1 Purdon's Dig. p. 417, pl. 66; p. 419, pl. 74.

The 31 section of the same Act, 1 Purd. p. 425, pl. 99, gives the express power to administrators *de bonis non* with a will annexed to demand and recover from their predecessors in the administration, or their legal representatives, all moneys, goods

and assets remaining in their hands, due and belonging to the estate of the decedent. This right of the administrator *de bonis non* is exclusive; Com'lth *v.* Strohecker, 9 W. 479; Montgomery's Estate, 7 Phila. 504.

The facts in the case of Lantz *v.* Boyer, Admin. *d.b.n.c.t.a.* 31 P.F. Smith 325, are very much like those that exist or that are suggested in the case at bar. There as here, the testator made a common fund of his estate, real and personal, a life estate given to the widow and absolute direction to the executors to sell if she should desire it and the proceeds of the sale to be invested, the interest to be paid to the widow for her life, &c.

When the wife's life estate should expire, the distribution is to be made by the executors certainly, and that *virtute officii*. This duty of distribution then devolved of necessity upon the administrator *de bonis non cum testamento annexo*. If so he must be entitled to receive and invest the fund and hold it so invested until the period of final distribution shall arrive. This case must be considered as decisive of the very question now before us and which was raised and discussed by the counsel in that case. See also Olwine's Appeal, 4 W. & S. 492, although determined before 1846. Where by the will the trust for the widow is annexed to the office of the executor, on his death it can "*only* be exercised by an administrator de bonis non;" also Com'lth *v.* Barnitz, 9 Watts 252. For above reasons the prayer of petition refused.

O. C. of Philadelphia.

Lafferty's Estate.

Death of a widow three days after filing petition for exemption, and before the approval of the appraisement by the Court, does not invalidate the claim.

Sur exceptions to widow's exemption.

February, 3, 1883. HANNA, P. J.—A novel question is raised by the exceptions, and as far as we can ascertain, without precedent. The widow of decedent within a reasonable time after the death of her husband, notified the administrator that she claimed the benefit of the Act of April 14, 1851, and elected to retain as part of her exemption, household goods, etc., and claimed the balance in cash, "whenever the same comes into the hands of the said administrator." An appraisement of the household goods was accordingly made by the appraisers, certified under the Act of Assembly, and with the petition of the widow filed in accordance with the rule of Court. The goods included in the inventory and appraisement comprised the entire personal estate of decedent, but it appears he was the owner of a single piece of real estate, a small dwelling house. This, however, was not appraised, nor was any request therefore made by the widow. She died three days after the filing of her petition, and prior to the approval by the Court of the appraisement af the personal property retained by her as before stated. It is now objected by the administrator of the deceased husband that as the widow died before the approval of the appraisement, it is too late for confirmation, and the household furniture remains the property of her husband's estate. And, further, as to the real estate, this never having been appraised, no allowance can be made out of its proceeds when sold. It is to be observed, no objection is made by any creditor of the deceased husband. In view of the facts stated we are of opinion that so far as respects the claim of the widow to retain the personal property duly inventoried and appraised, in the absence of any valid objection by creditors of the deceased husband, the occurrence of her death before the approval of the appraisement, is of no consequence. There was nothing to prevent the approval of the appraisement, the day of its filing, except by rule of Court, notice must be given by advertisement, to creditors and others interested, to object thereto, if they so desire. No objection was made, except by the administrator, and he is not affected

by the claim to the exemption. If the claim had never been made by the widow, by was presented by her executor, the case would be far different, and clearly could not be allowed. It is a personal privilege, and if not claimed, is presumed to be waived. In this case, the widow promptly availed hereslf of the provision for her benefit, complied with the requirements of the statute, and we fail to discover any sufficient reason why the appraisement should not now be approved. The appraisement comprising only the household goods, etc., claimed, there being no money or other personal assets out of which to pay the balance to which the widow was entitled, and the real estate not having been appraised: (Hufman's Appeal, 31 P. F. S. 329; 2 W. C. 635; Nixon's Appeal, 6 id. 496; Somers' Estate, 38 Legal Intell. 95: Andress' Estate, 38 Legal Intell. 5,) it will therefore be approved as to the goods and chattels therein mentioned.

Exceptions dismissed and appraisement approved *nunc pro tunc.*

QUARTER SESSIONS.

Q. S. of Lancaster Co.

Road in West Cocalico Township.

Roads—Public—When termini sufficicently certain.

It is not requisite in an order to viewers, that it shows that the public road to be laid out is to begin in a public road, and to end in a public road, but is sufficent when the points of termini are set forth with reasonable certainty.

Exceptions to report of viewers.

January 13, 1883. PATTERSON, A. L. J.—Notwithstanding the numerous exceptions filed to the report of viewers, there are but two, the 1st and 2d, which were argued before the Court by counsel, and which require our attention.

The 1st is that: "The order to the viewers does not show that the public road to be laid out is to begin in a public road and to end in a public road."

The 2d is that: "The public road as laid out does not show that it begins in a public road."

In this proceeding it appears the clerk of this Court did not insert in the order, the exact words, as used in the petition to describe the road. That was a censurable omission and should not again occur. The order, however, in this proceeding on its face sets forth that the petitioners and divers inhabitants labor under inconvenience, for want of a public road, and then states its beginning and ending.—The law requires that the definite points where a road, public or private, shall begin or end, should be set out with a reasonable certainty: (9 Smith 358). Unless it so appears on the face of the proceeding, the order for opening the road cannot be sustained. That requisite has been complied with in the proceedings before us.—The *termini* of the road proposed appearing in the order and in the report, are manifestly reasonably certain.

Had the road petitioned for been asked as for a *private* road, the two exceptions above recited would have been fatal to the report in question and to these whole proceedings. For by the very terms of the road law of 1836, a petitioner for a *private* road must ask for a road from the respective dwellings or plantations of the petitioner or petitioners, "*to a highway or place of necessary public resort, or to any private way leading to a highway.*" But the provision made for *public* roads by the said Act, does not prescribe any specific *termini* in terms. Section 1st says: "The Court of Quarter Sessions of every county of the Commonwealth, on being petitioned to grant a view for a road, within the respective county, shall have power and are hereby required, in open Court to appoint, as often as may be needful, six persons, &c." The Act, it will be seen, does not require the petition to state that it is for a public road even. The 3d section of the Act, however, directs that the viewers shall make report, and specifies

what their report shall contain; and, amongst others that they shall state particularly "whether the road desired be necessary for a public or private road."—That seems to be the only provision in the Act to determine its character as a *public* road. That requirement the viewers in this case have complied with. Their report specifically states that they "judge the same necessary for a public road:" 17 S. & R. 388.

The report and the draft annexed both make the *termini* of the proposed road reasonably certain, and seem to be in compliance with the road law, where roads for public use are petitioned for in every particular.

In the opinion of the court the first and 2d exceptions, first above recited, as well as the five remaining exceptions filed, must all be dismissed and which is now accordingly done.

COMMON PLEAS.

C. P. of Schuylkill Co.

Heffner v. Confair.

Where a rule to arbitrate has been entered and the time to choose arbitrators has gone by, judgment by default may be rendered without striking off the rule to arbitrate.

Rule to strike off judgment.

WALKER, J. On the 1st Oct., 1875, the writ in this case was issued, and a blank notice to choose arbitrators in October was placed in the sheriff's hands, with authority to fill up the blank at the time of the service of the writ upon the defendant. This the sheriff neglected to do. On 17 January, 1876, the plaintiff having first filed an affidavit of his claim and a declaration, took judgment for $113.79, for want of an affidavit of defense. On the same day the defendant's counsel asked and obtained from the court one week in which to file an affidavit of defense, and, if this was sufficient, the judgment was to be opened.

At the expiration of this time the defendant, without filing an affidavit, asked for a rule to strike of the judgment for reasons appearing of record—the reasons being that the plaintiff having given notice to choose abitrators had removed the cause out of the jurisdiction of the Court, and by his failure to have the notice stricken off in the prothonotary's office the judgment was irregular and void.

The question now is, shall this be granted?

Under the 4th rule of Court, when a rule to choose arbitrators has been entered, and the day to choose arbitrators has gone by without a choice, the rule may be stricken off at the instance of either party and at the costs of the party entering the rule.

In Camp *v.* Bank of Oswego, 10 Watts 133, it is decided that after a rule to arbitrate has been entered, a judgment by default can be rendered without striking off the rule. The entry of such a rule does not take the cause out of court nor deprive the court of its jurisdiction. The court say: "If no step has been taken except to enter the rule, and the time has gone by when the arbitrators were to be chosen, there is nothing to prevent either party from treating it as a nullity, as it appears on the record itself, that the attempt to arbitrate has proven abortive.

See also Taggart *v.* Fox, 1 Grant 192—Hoffman *v.* Locke, 7 Harris 58.

By the act of 14 May, 1874, Pamp. Laws, p. 159, the defendant is not permitted to arbitrate until a sufficient affidavit of defence is filed.

In the present case the defendant cannot complain that he has been mislead by the action of the plaintiff, in entering the rule, for the court gave him one week to file his affidavit, which he refused to do. The judgment is therefore regular and as the opening of judgments is discretionary with the court, this rule should be denied as there is no equity in the application.

Rule refused.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAR. 15, 1883. No 2.

COMMON PLEAS.

Ottemiller vs. New Era Life Association, No. 2.

Insurance—Forfeiture of Policy—Non-payment of Annual Dues.

In a suit on a policy of insurance in a mutual company, plaintiff offered to prove, as a reason for the non-payment of annual dues that he failed to receive notice that such dues were to be paid, that he had been told by the agents of the company that he would receive such notice, and that it was the custom of the company to send such notice. The Court rejected such offer and the plaintiff was non-suited. On a motion to take off the non-suit, HELD, That such offer was improper and the non-suit must be sustained.

The plaintiff knew, or was bound to know, when the annual dues were payable, and the usage of the company, and his reliance of receiving such notice, are no excuse for non-payment.

The declarations made by the agents could not add to the original contract a condition to the effect that if he did not get notice he need not pay.

A Mutual Life Insurance company is under no obligation to give notice to its members of the time of payment of premiums or annual dues.

Rule to take off compulsory non-suit.*

On the trial of the case plaintiff offered the policy of insurance in evidence, proved the death of the insured, and offered to prove that one of the conditions of the policy, viz: the payment of annual dues, was not fulfilled, because plaintiff had been told that he would receive notice of the time of payment of such dues, that it was the custom of the defendant company to send such notices, and that he never received the same. The Court rejected the offer and entered a compulsory non-suit. This rule was then taken, on the ground that the evidence offered was sufficient to excuse the non-payment of the annual dues.

E. W. Spangler, W. C. Chapman, for rule.

Wm. Hay, Wm. Henry Smith, contra.

January 22, 1883. GIBSON, A. L. J.—The motion to take off the judgment of non-suit in this case is based upon this reason, to wit: that the facts offered to be proved by the plaintiff on the trial to excuse the non-payment of the annual dues falling due August 31, 1879, were sufficient in law, to avoid the forfeiture of the certificate of membership.

The plaintiff offered to prove, that at the time the policy was assigned to him, he paid an assessment of twelve dollars and a half then due on the policy, to an agent of the defendant, and also offered to pay the annual dues of three dollars, payable on the 31st of August thereafter, and that the agent said he could not receive that as it was not yet due, and that the plaintiff would get notice from the company when to pay the annual dues and everything he would have to pay. That shortly afterwards, a general agent of the company, who exhibited his credentials as such, came and delivered to the plaintiff, the policy with the assignment duly approved, and the plaintiff asked this agent, about the payments he would have to make on the policy, who replied that he would get notice from the company when to pay the annual dues and everything he would have to pay. That he relied upon these representations of the agents of the company. That he never got notice to pay the annual dues, and did not know they were due until after the death of the insured, when he was notified that the policy was forfeited by reason of the non-payment of the annual dues. That after the death of the insured and before the commencement of this action, the plaintiff offered to pay to the defendant the annual dues, and the defendant refused to receive them. This was to be followed by evidence, that it has been the custom of the defendant and like companies, to give notice to holders of policies of the time such dues became payable.

The certificate of membership or policy, is dated the 31st of August, 1878, that of the assignment, June 19th, 1879, and of the approval of the company, July 1st, 1879. The party insured died on the 17th of October, 1879. The annual dues were not paid or offered to be paid up to the time of his death.

I do not think that the declaration of the agents can have any greater effect than the custom to give notice has, on the question. The plaintiff knew, or was bound to know when the annual dues were payable, and the usage of the company, and his reliance upon receiving such notice, are no excuse for non-payment; Thompson *v.* Insurance Co., 104 U. S. 252. The declarations were evidently made with no view of binding the company. They were made in reply, in the one case, to the plaintiff's offer to pay his dues in advance, and the remark was a natural one on his declining to receive the dues then, two or three months before they were due, and the assignment of the policy not yet approved. In the other case, the declarations were in reply to a question by the

*See Ottemiller v. New Era Life Association, 2 YORK LEGAL RECORD 133, where a motion was made for a change of venue in this case.

plaintiff, about the payments he would have to make, not, whether he would get notice or not, as stated in the purpose of one of the offers. These inquiries show that the plaintiff knew he had to pay dues on the policy he had purchased. The agents could not, by their declarations, add to the original contract, a condition, to the effect, that if he did not get notice he need not pay. The contract of insurance, with all its conditions, had long since been entered into, and the assignment of it to the plaintiff had already been made, and had the approval of the company in the last instance, and the declarations were in no way an inducement to him to buy the policy. There was nothing upon which the plaintiff had a right to rely as a ground that the forfeiture would not be exacted in case of non-payment at the day. There was no notice required because of the uncertainty of the amount to be paid, by reason of dividends to be credited on the premium, as in Phœnix Mutual *v.* Doster, 3 YORK LEGAL RECORD or dividends in the hands of the company as in Girard Ins. Co. *v.* Mutual Co., 1 Out. 15. But in the policy itself a sum certain and a day of payment were fixed, and there was a condition of forfeiture in case of non-payment.

With this duty incumbent upon him, whether the company gave notice or not, and whether the agents said he would receive notice or not, the conduct of the company in failing to give notice and in forfeiting other policies, can have no relevancy to the question of the plaintiff's obligation in this case. And if the practice of the company, had been as intimated in one of the offers, to give notice only to members insured, and not to beneficaries, or their assignees, it accounts for this plaintiff, an assignee not receiving notice; or if the declarations of the general agent to the plaintiff, can be construed to be a misrepresentation to him, still he had no right to rely upon it. It is the custom of these mutual life insurance companies to give notice to their members of the time of payment of premiums or annual dues. But the law is declared to be that they are under no obligation to give such notice; Thompson *v.* Ins. Co. *supra;* Girard Mut. *v.* Mutual, *supra*. I cannot say that an agent telling a party that he will get such a notice, and the company fails to give it, that the holder of the policy is misled or lulled to sleep, and, that the company is thereby estopped from setting up the forfeiture, much less that it is a waiver of the condition in the policy, or that he had a just and reasonable ground to infer that the forfeiture would not be exacted. The following provisions, among others, are in the certificate: "Conditions which shall release this association from all liability; any omission or neglect to pay the annual dues on or before the time stipulated in this certificate." The stipulation in the certificate is "that Henry Lentz, Jr., has covenanted and agreed to pay to said association annually the sum of three dollars on the 31st day of August each and every year commencing on the 31st day of August, 1878, and continuing so long as the said Henry Lentz shall live."

Rule discharged.

Marshall v. Hale.

Judgment—Opening of—Evidence of indebtedness.

The note with warrant of attorney to confess judgment, and upon which judgment was entered against the defendant, was signed by him when he was in a drunken spree, and on a petition to open such judgment he testified that he had no knowledge of signing such note. The plaintiff was unable to show clearly the defendant's indebtedness to him, to the amount of the judgment. HELD, to be sufficient cause to send the case to a jury.

Rule to open judgment, &c.

The facts are given in the Court's opinion.

W. C. Chapman for rule.

Blackford & Stewart, contra.

January 22, 1883. GIBSON, A. L. J.—There appears to be up in this case sufficient ground for the submission to a jury of the question of indebtedness on the part of the defendant to the plaintiff. The defendant denies in his affidavit and deposition, all knowledge of the judgment note on which this judgment is entered, and of his having ever signed such a note. The payee and legal plaintiff, though testifying to the fact of having seen the defendant sign the judgment note, does not give that satisfactory statement as to the indebtedness of the defendant to him, which ought to be required of him, and on allegation, under oath, on the part of the defendant, in a judgment entered on a warrant of attorney, of want of indebtedness.

The intercourse between the parties, as shown by the depositions, the unfortunate habits of inebriety shown on the part of the defendant, and all the circumstances which appear surrounding the transaction, require at the hands of the plaintiff a reason for the execution of the judgment note beyond any suspicion of imposition or fraud. It appears that the defendant left home on

the day of the date of the judgment note and was about the hotel of the plaintiff on a drunken spree for three or four days, and returned home in a state which resulted in an attack of *delirium tremens*.

One of the items given by the plaintiff as part consideration for the judgment note, was the price of a watch purchased when they were together, the defendant, being in liquor at the time, and sold afterwards by the plaintiff to the defendant at an exorbitant profit. The circumstance of the present of a gold watch and chain costing fifty dollars, by a man in the defendant's apparent position in life, to the plaintiff's wife, accompanied by the reckless and senseless behavior of the defendant on the occasion, indicative of the phrensy of intoxication; the watch purchased having been paid for by the note of the defendant to the jeweler, followed by the subsequent return of the watch by the legal plaintiff and the redemption thereby of the note by him on which he was surety, and suit thereon instituted by the said plaintiff against the defendant, though disavowed as a part of the consideration of the judgment in question, nevertheless gives rise to the suspicion of advantage being taken, at or about the time of the execution of the judgment note, of a man rendered incapable of discretion by being addicted to the use of intoxicating liquors.

If there is an actual indebtedness on the part of the defendant to the plaintiff of the amount of the judgment, and such was shown with reasonable certainty by the depositions, the question whether or not the defendant was in such a state of intoxication as to impair his intellect, at the time of signing the judgment note, would be the only ground upon which this application could be based; Noel *v.* Karper, 3 P. F. S. 97. But where there is an absence of proof, by the ordinary methods of any consideration, and beyond the item above mentioned, only a general statement by the legal plaintiff, that money was loaned by him to the defendant, the aggregate of the sums stated not equalling the amount of the judgment, together with an indifference manifested by him as to books being produced containing charges of the same, which indeed are not positively stated to exist, there is enough appearing in the case to base a presumption unfavorable to the plaintiff's claim, and which requires such an investigation of the facts as only a trial on the merits of the claim will afford. Rule made absolute.

Metzgar v. Shetter.

Certiorari—Justice's record—Plea of settlement—Time returnable—Variance.

The Justice's summons was "being in plea of settlement of book account." HELD, That the claims and credits shown in the record not being like actions against baliffs, receivers, partners or trustees, the exception to the summons must be dismissed.

The summons was made returnable at eleven o'clock, instead of between certain hours. HELD, That the Act of 26 April, 1855, while it permitted the justice to make the summons returnable between certain hours did not make it obligatory upon him to do so, and if he did not, it is not fatal to the proceedings.

The summons was "plea of settlement on book account" and the docket read "summons in debt on plea of settlement on book account." HELD, To be an immaterial variance.

Certiorari to F. R. Prowell, Esq.

The grounds upon which the exceptions are based are given in the Court's opinion.

D. K. Trimmer, certiorari.

E. W. Spangler, contra.

January 22, 1883. GIBSON, A. L. J.—The exceptions to this certiorari are to the summons issued before the justice:

First. That "being in plea of settlement of book account, the justice had no jurisdiction therein." This is based upon the erroneous idea that the suit sound in an action of account render. But a large portion of the jurisdiction of justices of the peace would be ousted, if just such claims and credits as this record shows, were obnoxious to the charge of being like actions against baliffs, receivers, partners or trustees, and subject to the perplexities of account render or a bill in equity. The exception is dismissed.

Second. "That the proceedings are irregular in making the summons returnable at 11 o'clock instead of *between* certain hours." The third section of the act of 26 April, 1855, P. L. 304: Bright. Purd. 851, pl. 44, provides "that all summons issued by any alderman or justice of the peace, may designate the hours of the day between which the same shall be returnable; and if either of the parties fail to appear during the time so designated, it shall be lawful for the said alderman or justice of the peace to render judgment, or otherwise determine the same, as is provided by law."

In the case of Vought *v.* Sober, 23 P. F. S. 49, an hour was fixed for the return of the summons, and on adjournment to another day, and an hour fixed. In default of appearance the plaintiff was non-suited by the justice. This was affirmed by the Supreme Court. No objection, however, was made at any stage of the proceedings. In the case of Lindsay *v.* Sweeny, 6 Phil.

309, the proceedings before the justice were set aside, because of the practice in Philadelphia, that where an alderman enters judgment by default, the hour should be named. But such has not been the practice here. Judge Brewster says in his opinion, in that case, that he should be disposed to sustain the judgment, because a reasonable presumption should be allowed in favor of regularity of the proceedings before magistrates, and that the act of assembly provides. 22 Sec. of Act of March 20, 1810, Bright. Purd. 412, pl. 23, that the proceedings shall not be set aside for want of formality &c., if it shall appear &c., that judgment was rendered on the day fixed to the precept, "making no allusion to the hour."

The act in question provides that the justice *may* designate the hours of the day between which the same shall be returnable, and if either of the parties fail to appear within the time so designated it shall be lawful for the justice to render judgment. But it does not make it obligatory upon him to do so. And if he does not I do not think it fatal to the proceedings.

Third. That the docket of the justice shows a different cause of action from that mentioned in the summons. On the dock it is "summons in debt on plea of settlement on book account," and the summons leaves out the word "debt." This is immaterial in a suit before a justice.

Proceedings affirmed.

Shetter v. Metzgar.

Certiorari—Former suit between same parties.

M. brought suit against S. before a Justice of the Peace and obtained judgment by default. Afterward S. brought suit against M. before another Justice. On the hearing M. offered in evidence the record of the former suit, as a bar to plaintiff's recovery in the present case. The evidence was rejected, and judgment entered against the defendant. HELD, on certiorari, that the neglect of the present plaintiff to bring in his claim as set-off in the first suit was a bar to any subsequent action, and the proceedings must be set aside."

Certiorari to Wm. E. Patterson, Esq.

Metzgar brought suit against Reuben Shetter before Esquire Prowell in a "plea of settlement on book account," and obtained judgment by default, defendant relying on supposed defects in the summons as being sufficient to oust the Justice's jurisdiction. See Metzgar *v.* Shetter, *supra*. Afterwards Shetter sued Metzgar before Esquire Patterson, and upon the trial Metzgar offered in evidence the record of the former suit as a bar to the latter. The Justice refused to consider the record as a bar, holding the former Justice's record to be defective, and therefore worthless for the purpose offered, and gave judgment for the plaintiff. This certiorari was taken, based upon the rejection of the above offer.

E. W. Spangler, for certiorari.

D. K. Trimmer, contra.

January 22, 1883. GIBSON, A. L. J.—The exceptions on this certiorari are based upon the ground that in a suit between the same parties before F. R. Prowell, Esq., a justice of the peace, of York County, on the 7th of August, 1882, summons was served on the defendant in that suit, who is the plaintiff in this, returnable on the 12th day of August, 1882, and that on the hearing before said justice the defendant did not present his claim as set off according to the provisions of the act of Assembly, and hence was barred from the further prosecution of his claim.

The act of 20 March, 1810, Sec. 7 Bright. Purd. 854, pl. 54, provides: "A defendant who shall neglect or refuse in any case to set off his demand, whether founded upon bond note, penal, or single bill, writing obligatory, book account or damages on assumption, against a plaintiff which shall not exceed the sum of one hundred dollars, before a justice of the peace, shall be and is hereby forever barred from recovering against the party plaintiff by any after suit." In the case of Groff *v.* Ressler, 3 Casey 71, where two suits, under similar circumstances, were carried on without objection, both proceedings were held valid. But here an objection was made at the hearing. A paper was filed on behalf of the defendant, protesting against the justice entertaining the suit, followed, after judgment by a certiorari, on that exception.

Judge King in Slyhoof *v.* Fitcraft, 1 Ash. 171, explains the principle as applicable to such a case. That where there exists two tribunals possessing concurrent and complete jurisdiction, the jurisdiction of that tribunal is exclusive which has first possession of the subject matter of the controversy.

This suit was brought on the 7th of August, for hearing on the 12th of the month, yet a summons was issued before another justice on the 11th of August, pending the return of the first summons, by the defendaut in the first suit. This is precisely the case the act of assembly was passed to remedy.

Proceedings set aside.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAR. 22, 1883. No. 3

SUPREME COURT.

Yeatman's Appeal.

When the real estate of a solvent decedent is sold by order of Court for the payment of debts, interest on liens does not stop at the date of confirmation of the sale, but when the money is paid to the debtor.

PER GORDON, J. If the estate were insolvent, the interest would cease at the date of the confirmation of the sale.

Appeal from the Orphans' Court of Chester county.

Carlton J. Passmore died testate, seized of certain real estate which was sold, on the application of the executor, who was also a legatee, by order of the Court to pay debts. The purchaser was also a legatee. The personal property was sufficient to pay all the debts except a mortgage of $5,000 which was a lien on the real estate sold. The sale was confirmed Dec. 11, 1881. On May 8, 1882, the executor paid the appellant the amount of his mortgage with interest to the date of the confirmation of the sale. A deed to the purchaser was made about April 1, 1882, when the purchase money was to be paid. The account of the executor showed a considerable balance, after payment of all debts, which was payable to legatees under the following provision of the will :— "I leave to William's boys all of my property, to be divided between them, share and share alike * * * after all my debts are paid." The appellant presented the bond accompanying this mortgage before the auditor on distribution (John H. Brinton, Esq.,) and claimed interest thereon from Dec. 11, 1882, to the date of the distribution by the auditor. The auditor allowed the claim. Exceptions were taken to this allowance, which were sustained by the Court below (FUTHEY, P. J.) and the report recommitted to the auditor for correction.

This appeal was taken to the final decree of the Court.

February 26, 1883. GORDON, J. The appellant held the bond of Carlton J. Passmore, the testator, for the sum of $5,000, which was secured by a mortgage on certain of the real estate of the obligor.— Some time after the death of Carlton J. Passmore, his executor and legatee, Wills Passmore, acting under the authority of an order of the Orphans' Court, sold the real estate for the payment of debts and legtcies.

This sale was confirmed December 12, 1881, and on the 8th of May, 1882, the executor paid over to Yeatman the full amount of the principal of his bond, but refused to pay the interest accruing between those dates. Before the auditor, who was appointed to make distribution of the money raised from the sale above mentioned, the appellant present a claim for this interest, $128.90, and had it allowed. To this allowance an exception was taken, which was sustained in the Court below, on the ground that the interest on the bond ceased at the time of the confirmation of the executor's sale. Had the estate of Passmore been insolvent, the doctrine assumed by the Court below would have been unexceptionable, for, in that event it would have had the support of all the authorities from Ramsey's Appeal, 4 W. 71, down to the case of the Brownsville Bank, 15 Nor. 347. But Passmore's estate was entirely solvent and the sale was not made on motion of the mortgagee, but upon the motion of the executor end for the purpose of the settlement of the estate. Under these circumstances, we cannot understand why the appellant was not entitled to his whole claim, debt and interest. This is a very good reason why a defendant, as in Strohecker *v.* Farmers' Bank, 6 Watts 96, should not be charged with interest after the return day of an executor levied upon his property, for the creditor has thereby paid himself by a sale of his debtor's goods or lands, and the money thus made is then in the hands of the sheriff who occupies

the position of a trustee or baliff for the plaintiff. If, however, as is admitted in the case cited, the defendant, by his interference, delays the payment of the money to the plaintiff, he is chargeable with the accruing interest. So, as in Ramsey's Appeal, 4 W. 71, where the lands of an insolvent estate are sold for the payment of debts, there is also a good reason why the interest upon those debts should stop upon the confirmation of the sale, for the fund then belongs to the creditors, and they are entitled to distribution as of that time; hence, there is no fund left for the payment of subsequently accruing interest. But even this rule, as we find by the Brownsville Bank case, above cited, has its exception, for it was there ruled that when the fund continues to draw interest after the date of the confirmation of the sale, the creditor is entitled to his proportionate share thereof. Nor is the case of the Carlisle Bank *v.* Barnett, 3 W. & S. 248, without force as authority, in the question before us. There Barnett was compelled to pay the accruing interest on the obligation, in which he was surety, though by a previous decree of the Court there had been awarded to the Bank the full amount of its claim from a fund raised upon a collateral judgment. But, as was said by Mr. Justice SERGEANT in that case, this appropriation would have been payment had it been immediately available, but as it was locked up in Court, and was not immediately available, there was no payment until the money came into the possession of the Bank: hence the liability of the parties to the original obligation continued.

The same language may well be applied to the case in hand. By the executor's sale, there was more than enough money raised to have satisfied Yeatman's lien, and, had it been immediately applied to the payment of that lien, there would have been an end to all controversy. But it was not so applied; the appellant had to await the motion of the executor, and so it happened that the claim remained unpaid until some six months after the confirmation of the sale. On what principle, then, is Yeatman to be made to forfeit a substantial part of his bond? Or how can his debt be said to have been paid before he got the money for it? It is true this was an official sale, and, by it, the lien of the mortgage was extinguished, but what of that? It did not extinguish the debt secured by the mortgage, that remained until it was paid, so that, in effect, the sale had no more significance than if it had been made under a power in the will. It was made for the settlement of a solvent estate; the money went to the executor, and it was only through him that Yeatman could receive it. The delay was caused by no act of the appellant, nor by a judicial necessity, but by the executor and for the convenience of the estate which he represented; hence there is no reason why the appellant should not have had full payment of his claim, debt and interest.

The decree of the Court below, so far as it sustains the exception to the auditor's report awarding to the appellant the sum of $128.90, the amount of interest due on his bond after December 12, 1882, is now reversed and set aside at the cost of the appellee, and the auditor's report, as to that amount, is now restored and confirmed.

Nixon v. McCrory.

In action on a promissary note defendant can set off a claim against plaintiff for damages done to defendant by plaintiff while he, plaintiff, was employed as engineer for defendant.

Error to Court of Common Pleas No. 1 of Allegheny county.

This was an action, brought by William McCrory against Joseph Nixon, to recover the amount of a promissary note for $906.69, dated the 17th day of March, A. D. 1881.

The plaintiff filed the usual affidavit of claim, and the defendant appeared and filed an affidavit of defence, setting up a

counter demand as a set-off or defence to the note.

The defendant, Nixon, is the owner of a steam-tug engaged in towing coal barges from Pittsburgh to Louisville, Ky., and Cincinnati, Ohio. And the plaintiff, McCrory, is a steamboat engineer. And Nixon alleges that he employed McCrory as an engineer on his boat, and that the boat left Pittsburgh with a tow of barges and arrived at Cincinnati on or about April 8th, 1879, when McCrory advised the crew to strike for wages, and entered into a conspiracy with them to enforce an increase of wages or to *jump* the boat, as termed by river men; and upon the captain refusing to comply with his demands that he, McCrory, the engineer, left the boat with the fires under the boilers, and with a high pressure of steam, whereby the boilers were injured to the extent of $1000, and claimed as a set-off the damages thus sustained by him against the note held by the plaintiff, and sued on. This the court below held he could not do, and sustained the judgment for want of a sufficient affidavit of defence; but this difficulty was removed by allowing the defendant to file a supplemental affidavit of defence.

A writ of error was taken to review the judgment of the court below in holding that the affidavit of defence was not sufficient, and that the damages sustained by the defendant by reason of the conduct of the plaintiff while engaged on his boat at Cincinnati could only be recovered by an action on the case for negligence or malfeasance, and would not, therefore, be the subject of set-off against the note sued on.

November 20, 1882. PAXTON, J. For the purpose of this case we must assume the facts to be as stated in the affidavit of defence. If, as the defendant swears, he hired the plaintiff as engineer on board the steamer Joseph Nixon, for the term of one month, and that during said term the plaintiff not only left the steamer and his service while in a foreign port, but in addition conspired with and induced the crew of said boat to desert it, he was clearly guilty of a breach of his contract with the defendant. The defendant also swears, that when the plaintiff deserted the steamer, he left it with a high pressure of steam in its boilers, with a large fire under the boilers and the fire doors closed; that the said plaintiff was the officer in charge of said boilers and the machinery of said boat; that it was his duty to regulate the pressure of steam, control the fires, and see that the fire doors were opened at the proper time, and that by reason of this neglect the boilers were injured. While the affidavit is not as full and precise as it might have been, we cannot say it is evasive. It sets forth substantially a breach of contract and of duty on the part of plaintiff by means whereof the defendant was injured.

Can such injury be set-off under our Defalcation Act against the note in suit? Of this we are in no doubt. The precise question was ruled in **Halfpenny** *v.* **Bell**, 1 Norris 128, which is one of the more recent of a long line of cases assisting the same principle.

The rules of the court below provide that where a defendant admits a part of plaintiff's claim to be due, the plaintiff may accept the tender, take judgment, issue execution, and go to trial for the balance. Here the defendant admitted nothing, but denied the right of the plaintiff to recover anything. Yet the learned court gave judgment against the defendant for a part of plaintiff's claim, and permitted the plaintiff to go to trial for the residue. This was certainly a liberal construction of the rule of court, and leave us in some doubt whether there is a final judgment below to which a writ of error would lie. As the case must go back, we have concluded to decide the main question.

The judgment is reversed and a *procedendo* awarded.

Hollis vs. Burns.

Upon the question of an implied renewal of a tenancy all the terms of the former lease must be considered.—Hence, if a landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held.

Error to the Court of Common Pleas, No. 1, of Philadelphia county.

October 2, 1882. MERCUR, J. The plaintiff declared in *assumpsit* on an implied contract for use and occupation of a certain dwelling house. The defendant had rented the house and occupied it for twenty months. Then she withdrew therefrom, notified the plaintiff, paid the rent up to the time, and tendered the key, which the plaintiff retained in such a manner as not to release her from liability for the unexpired portion of the year in case she was legally chargeable therefor.

The plaintiff claims she was a tenant from year to year, and seeks to recover rent for four months after she left the house. The defendant alleges she rented by the month, and was not liable beyond the months of her occupancy. The letting was by parol, and the evidence as to its terms were conflicting. The learned judge charged the jury "if it was a letting for fifty dollars per month, without anything being said about a year, then the plaintiff cannot recover the amount here claimed.

The only specification of error is to this charge. The plaintiff claims whether the original lease was by the year or by the month; inasmuch as the defendant held over beyond a year, she can be required to pay for the whole of the second year, although she did not occupy the premises during any part of the last four months. Had the lease been by the year, the tenant might be so liable: Diller *v.* Roberts, 13 S. & R. 60; Phillips *v.* Monges, 4 Wharton 226; Hemphill *v.* Flin, 2 Barr, 144—All these were cases where the letting was by the year. They recognize a sound principle. Where the landlord has let specific property by the year, it would be manifestly unjust to compel him against his will to assent to a renewal for such shorter term as the will or caprice of his tenant might dictate.

If the lessee enters as a tenant by the year, and holds over, it is optional with the landlord either to treat him as a tenant from year to year or as a trespasser; Hemphill *v.* Flin, *supra*.

It is true, for some purposes the lessee for any certain time less than a year is recognized as a tenant for years: 2 Bl. Com. 140; Shaffer *v.* Sutton, 5 Binn 228.

When, however, we are dealing with the question of an implied renewal of a tenancy, all the terms of the former lease must be considered. The purpose is not to make a new lease essentially different, but to continue the former so far as its terms may be applicable. In its very nature the implied renewal of a lease assumes a continuation of its characteristic features. Hence, if a landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held. If that was a tenancy by the month, it will presumptively so continue. The landlord cannot impose a longer term, nor one radically different from the former.

In case a tenant by the month holds over, it will not be claimed that he is entitled to three months' notice to quit. If the tenancy be by the month, a month's notice to quit is sufficient: Taylor's Land. and Tenant, §57.

The jury has found the letting was by the month only. The tenant then had a right to leave when he did, and was not legally chargeable for use and occupation thereafter.

Judgment affirmed.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAR. 29, 1883. No. 4

ORPHANS' COURT.

Crone's Estate.

Wills—Construction of—Personal and real estate—Liability for payment of debts—Legacy after payment of debts.

The testator, by his will, devised, "to my beloved wife, Rebecca Crone, the interest of one-third of all my personal estate absolutely, and the interest of one-third of all my real estate during life." Then, after a specific bequest of farming implements, he directs that "all the rest and residue of my estate, real, personal and mixed shall be divided among my children share and share alike but the share coming to my son John I give, devise and bequeath unto his wife Mary Jane Crone for the use of my son John during life, and after his death to his children forever."

HELD, recommitting the Auditor's report, that the widow was entitled to one-third part of the balance of the personal estate after payment of a proportionate share of the debts, and to the interest of one-third of the real estate after a smilar payment.

Exceptions to Auditor's Report.

The testator, by his will, devised "to my beloved wife, Rebecca Crone, the interest of one-third of all my personal estate absolutely, and the interest of one-third of all my real estate during life." Then, after a specific bequest of farming implements, he directs that "all the rest and residue of my estate, real, personal and mixed shall be divided among my children share and share alike, but the share coming to my son John I give, devise and bequeath unto his wife Mary Jane Crone for the use of my son John during life, and after his death to his children forever."

The Auditor, Geo. W. Heiges, Esq., reported in substance as follows:

The Executors' account shows that $1286.78 was the amount realized by them from testator's personal estate, and that the liabilities of the testator, and his estate, in the nature of debts and expenses of settling up the estate already paid by the executors amount to the sum of $2447.71. It will therefore be readily seen that the items of credit taken in account for the payments aforesaid amount to a sum greatly in excess of the proceeds of the personal property. In view of the claim made by Messrs. Bentzel and Wanner, on behalf of Rebecca Crone, widow of testator, it is incumbent on the Auditor to briefly assign his reasons for the construction he places upon the will of testator in distributing and awarding the balance in the hands of the Executors.

The widow's counsel contend that the testator intended by his last will to bequeath, and did bequeath to his said widow, one-third of his personal estate, without any diminution whatever absolutely; and the interest of one-third of his real estate during her natural life, after deducting debts, &c., and claim accordingly.

The position of the Executors and accountants as announced by their counsel, Mr. Trimmer, and that by which they were governed in settling the estate is, that the personal estate of testator was, and is primarly liable for his debts and liabilities; and, as the personal estate has been exhausted, and the balance on hand is the proceeds of real estate sold for the payments of debts and must be distributed as real estate, the widow is entitled only to the interest, during her natural life of the one-third of the net balance. Mr. Wanner, in the course of his argument before the Auditor, announced several legal propositions:

First. That as the interest of one-third of the clear personal estate absolutely had been bequeathed to the widow, she it therefore entitled to the fund itself; as there is no direction as to where, or to whom the fund shall go at her death, citing Brownsfield's Estate, 8 Watts 465; Diehl's Appeal, 36 Pa. St. R. 120: Garret *v.* Rex., 6 Watts 14; Campbell *v.* Gilbert, 6 Wharton 72; Van Rensalaer *v.* Dunkin's Executors, 24 Pa. St. R. 252.

Second. That the law leans to an absolute, rather than to a defeasible estate, citing Fahmey *v.* Holsinger, 65 Pa.St.R. 388.

Third. That this is a contest between widow and residuary legatees, and that the debts must be paid out of residue, citing McLaughlin's Executors *v.* McLaughlin, Adm'r., 12 Harris 29. The Auditor cannot agree with the learned counsel on

this proposition nor does he think the case cited helps in the construction of the will in question. To this was also cited Duncan *v.* Alt, 3 P. & W. 382. Some stress was also laid by the gentleman on the word "*all*" in the bequest to the wife, now widow; but the Auditor fails to perceive the effect of the use of this word as contended for.

Fourth. The widow in selecting to take under the Will takes in lieu of dower and takes as a purchaser, citing Reed *v.* Reed, 9 Watts 263; Stewart's Estate, 3 Weekly Notes 332; 2 Bouvier's Law Dictionary 20.

Fifth. Where a man mades a Will the intestate laws are suspended by the law the testator makes, and his personal property is no longer first liable for the payment of his debts. This proposition in the broad and sweeping terms in which it is couched the auditor cannot affirm, for the reason contained in the citation from Justice Woodward, *Supra*, and for reasons that will appear further on in this report.

Sixth. Where a man blends his real and personal estate in his Will the land is chargeable with legacies; citing Gallagher's Appeal, 12 Wright 121. Davis' Appeal, 2 Norris 353.

Mr. Wanner argued further that the Executors here made the real estate assets for the payment of debts by petition to Court for order to sell the real estate and the subsequent sale thereof. That is true, but the surplus must be treated as real estate in this distribution. The gentleman further argued that though the bequest to the widow here, be not a special, or pecuniary, or demonstrative legacy, and though it may be a general legacy, it must be first set apart to her, and hence she is entitled to one-third of the personal estate undiminished by debts, expenses of administration of the estate or any other lessening agency; arguing further that the law does not forbid a testator from saying and directing that his widow shall have one-third of his personal estate, and one-third of his real estate, as contended for by the accountants. Mr. Wanner subsequently cited 12 Harris, *supra*, in refutation of the argument by Mr. Trimmer, that a fractional part of an estate can not be a specific legacy.

Mr. Bentzel, on behalf of the widow, argued that the intention of the testator most certainly was that his widow should have, not only the interest of a clear one-third of all his personal estate, but that she is entitled to a clear one-third, absolutely—the fund itself—that the intention of the testator must be gathered from the Will itself, and that the Will means this and nothing else. Mr. Bentzel cited 2 Williams on Exec's 1563.

Mr. Trimmer, counsel for the accountants, in reply, in the first instance, directed the attention of the auditor to the cases cited by counsel for the widow, alleging that nearly all bear on the question of specific legacies, and argued their non application to the case in hand, as it is not contended that the bequest to the widow is a specific legacy.

The learned counsel then announced the proposition that the personal estate, is in all cases of testacy as well as intestacy, the primary fund for the payment of debts, unless, in cases of testacy the real estate is made liable in express terms, and the personal estate is explicity exempted by the Will, or by the manifest intention of the testator.

In support of this proposition he cited Walker's Estate, 3 Rawle 229; Martin *v.* Fry, 17 S. &. R. 429; Ruston *v.* Ruston, 2 Y 63; Todd *v.* Todd's Executors, 1 S. & R. 457.

As to the legal meaning of the word "estate" the gentleman cited Mainly *v.* Stainbach, 1 Am. Dec. 545. That the word "all" does not add anything to the terms "one-third personal estate" he cited Huntter's Estate, 6 Pa. St. R. 97; Turbet *v.* Turbet, 3 Yeates 187.

He also cited Todd *v.* Todd, *supra*, to show that the words—whole of my estate

—mean after payment of debts. He argued further that the bequest to the widow is not only not a specific legacy, but that it is a general legacy, and also a residuary legacy after payment of debts.

The auditor has carefully read all the cases cited by all the gentlemen and believes that he has correctly stated the respective positions of all the learned counsel, as well as fairly epitomized their respective arguments.

Now what does the Will in question itself say, and what was the testator's intention. The latter, all concerned agree, must be gathered from within the four corners of the Will itself.

The testator directs *inter alia*, "That all my just debts, and funeral expenses (shall by my executors hereinafter named) be paid out of my estate as soon after my decease as shall by them be found convenient."

Item.

"I give devise and bequeath to my beloved wife Rebecca Crone the interest of one-third of all my personal estate absolutely and the interest of one-third of all may real estate during her natural life."

While it was not necessary that the testator should have directed that "my just debts" * * * "shall" * * * "be paid out of my estate," yet, the words here quoted have no little significance in our effort to ascertain the mind of the testator, John Crone. Woodward, Justice, in Hoff's Appeal, 12 H. 203, in passing upon John Hoff's Will, uses this language, "The Will contains in the introductory clause, the usual direction as to payment of debts, a phrase which in England is necessary to charge debts on the realty, but wholly unnecessary here, where lands as well as personal estate are bound for every decedent's debts. Still the words "after the payment of my lawful debts," cannot be treated as meaning nothing; and if they are to have any significance, it must be that the Executors should pay the debts before distribution be made of the estate in pursuance of the Will."

Estate has been shown to mean personal property as well as real property, by cases cited by counsel to accountants, *supra*, and testator's intention to charge his personal estate as well as his real estate with the burthen of the payment of his debts in the auditor's opinion is manifest, to say nothing of the rule found in the authorities cited by Mr. Trimmer, and referred to *supra*, that the personal property or proceeds thereof is the primary fund for the payment of a testate's as well as an intestate's debts, unless the personal property or estate is explicity exempted by the terms of a last Will and the burthen of payment of debts is as explicitly by the Will imposed on the real estate.

It is not contenced by any one that John Crone, by express and explicit terms imposed this burthen upon his real estate, and therefore the Executors committed no error in first exhausting the personal estate in the payment of testator's debts.

It would be a mere affectation of learning on the part of the auditor to repeat here what he understands to be the legal definition of the various kinds of legacies, and to reason upon what the legal character of the bequest to the widow is and what it is not. The auditor therefore rules that it was the intention of the testator John Crone, that his debts and funeral expenses should be paid if they consumed his entire estate both real and personal, in which particular he simply published and re-iterated the law of the Commonwealth in this behalf, and that his widow, Rebecca Crone should have the interest of one-third of his personal estate, should any be left after paying his debts and funeral expenses; (and had there been she would have been entitled to that one-third absolutely—the fund itself,) and to the interest of one-third of his real estate; and therefore the said widow Rebecca Crone is entitled to this distribution under the Will of her deceased husband as the

auditor interprets and construes it, to have secured for her the one-third of the net balance of the funds in the hands of the Executors after deducting the claims heretofore allowed and the expenses of this distribution—the annual interest on which one-third shall be paid, (and secured to be paid) to said Rebecca Crone, during life.

To this finding of the Auditor exceptions were filed by counsel for the widow.

E. D. Bentzel and N. M. Wanner for exceptions.

D. K. Trimmer for report.

January 29, 1883. GIBSON, A. L. J.—This case except in one feature of it, is not distinguishable from Martin *v.* Fry, 17 S. & R. 426, decided more than fifty years ago, and which, it seems, has never been questioned, to the effect that the gift to a widow of one-third part of the personal estate in lieu of dower, gives her no preference over the children, as they are equally the objects of the testator's bounty, and among whom the residue of the estate was to be divided, but that the personal estate was primarily liable for the debts, and she was entitled to only one-teird of the remainder of the personalty after the payment of debts. Though in Reed *v.* Reed, 9 Watts, 263, where an annuity in a widow's favor was charged upon real estate, and a sale of the estate showed a deficiency of proceeds to pay the charges upon it, her annuity was held not to abate, because having relinquished her dower she was entitled to a preference over children. Being a purchaser of a legacy in lieu of dower, it is said in Spangler's Estate, 9 W. & S. 135, that it is a circumstance of decisive importance in a question of abatement between her and collaterals or perhaps children. In this case, the gift is of the interest of one-third of the personal estate absolutely and of the interest of one-third of the real estate for life. It is conceded that the widow is entitled to one-third of the personal estate absolutely, if there is any such remaining after the payment of the debts; Bromfield's estate, 8 Watts 465.

But the question in this case in whether this is only a legacy to the widow after payment of debts, or constructively so, as in the case of Martin *v.* Fry, *supra?*—It determining the question of distribution here, I think the learned auditor has overlooked an important question of intention arising under the Will of the testator, from the blending of the real and personal estate. The testator has first provided that all his debts and funeral expenses, shall be paid out of his estate. Then after his bequest and devise to his widow, he directs, that "all the rest and residue of my estate, real, personal and mixed shall be divided among my children share and share alike." Hence the real estate having been blended by the testator with the personal estate; the charge is by implication upon both, and "rest and residue" means, what is left after the payment of debts and legacies: Hassanclever *v.* Tucker, 2 Binney 525; McCredy's Appeal, 11 Wright 442; Jane Gallagher's Appeal, 12 Wright 125; Davis' Appeal, 2 Norris 348. The rule, therefore, is not that the personalty shall be the primary and the realty the auxiliary fund for these charges, but that each shall contribute ratably to the common burden: 2 Jarman on Wills, 550*. The widow is therefore entitled to one-third part of the balance of the personal estate after the payment of a proportionate share of the debts and to the interest of one-third of the balance of the real estate after the payment of a proportionate share of the debts. The report is recommitted to the auditor for distribution accordingly.

[The Auditor filed a second report, in accordance with the Court's opinion. To this report exceptions were filed by all the parties concerned, which exceptions were set aside, and the report confirmed. An appeal to the Supreme Court from this decree has been taken by the accountants.]

YORK LEGAL RECORD.

VOL. IV. THURSDAY, APRIL 5, 1883. No. 5.

COMMON PLEAS.

C. P. of Adams Co.

Mehring v. Sparver.

Costs—Act on to try right—Judge's Certificate.

In an action of trespass quare clausum fregit, the defendant plead a right of way. The jury found for the plaintiff, and upon a motion for the Judge's certificate upon the verdict, so as to entitle the plaintiff to full costs HELD, That the Court will grant such certificate, where the title to the land is in question.

That where the defendant seeks to prove a right of way over the plaintiff's land, it is such an action as tends to encumber his title, and would come within the statute

Motion for judgment on the verdict with full costs, and motion for judgment without costs.

This was an action of trespass *quare clausum fregit*, to which the defendant plead right of way. The jury found for the plaintiff, with nominal damages. A motion was then made by plaintiff for the Judge's certificate that the question of title was raised, and that he be allowed full costs, while the defendant made a counter motion for judgment without such costs.

March 21, 1883. WM. MCCLEAN, P. J. It was said long ago in Buller's Introduction to the law relative to trials at Nisi Prius p. 330; Brightly on costs p. 24; that Judges have differed as to their notions of giving these certificates; many having thought themselves bound by the verdict; others thinking the statute meant to leave it to their discretion on the whole circumstances of the case. And this seems to be now the prevailing opinion, as otherwise the statute would be entirely useless. This view has received legislative embodiment in the repealing statute 3 and 4 Vict. c. 24, s. 1 and by the Judicature Act of 1875. This was not a trifling suit. It was commenced in this court for the purpose of maintaining the plaintiff's absolute title in his land.

The defence rested upon the plea of highway and sought to impose a perpetual servitude upon the plaintiff's title.

The plea of right of way to trespass qu. cl. fr. does not by any means admit an absolute title in the plaintiff; Law *v.* Hempstead, 10 Conn. 23; 2 Wheaton's Selwyn's Nisi Prius 1362 n 1.

This plea was found against the defendant, and the plaintiff is entitled to full costs: Wheaton's Selwyn 1374.

I am not at all surprised at the verdict. The defendant was inconsistent and unjust in placing obstructions even of a temporary character upon his premises at one end of the road, and enclosing the road within his upper lot and then insisting upon going with high hand *ad libitum* driving and walking over the plaintiff's land, endeavoring to relieve himself of the highway on his own land and to perpetuate it upon the plaintiff's, for the defendants' personal benefit, and not only this but after explicit notice in writing.

Originally the Judges considered themselves absolutely bound to certify in all cases where the trespass was after notice, but it is now held that the Judge has a discretion in the matter, but the discretion will generally be exercised in favor of the plaintiff when notice has been given; 2 Addison on Torts s. 1418, p. 673.

Whenever a defendant in an action for a tresspass upon the plaintiff's land sets up a *bona fide* claim to the enjoyment of some easement, privilege or profit thereon, and has any colorable ground for the claim, the action is brought to try a right, and the judge ought to certify to that effect upon the record; 2 Addison on Torts p. 666 s. 1410. This action was distinctly and according to the very words of the defendant himself, to try whether he has a right to do the act of which the plaintiff complains. Whenever the plaintiff seeks to negative the right of the defendant to do the act of which he complains, the action may be brought to try a right beyond the mere question of damages, precisely as was done in this case. "Suppose," observes Tindal, C. J., "a case can be put of a declaration of trespass (although I

do think it can) in which a right could not by possibility come in question, still, if it should appear to the judge that the plaintiff had really intended to try a right, I conceive that the judge would have power to certify.

If an action be really brought to try a right, whether it is calculated for that purpose, or not, the party is within the letter, and, as it seems to me, also within the spirit of the Act."

Although this was under the statute of 3 and 4 Vict. c 34 s 1, we have virtually a legislative and judicial construction of power and discretion of the judge in such cases under the statute of 22 and 23 Car. 2. c. 9.

See also Jones *v.* Thomas, 11 A. & E. 153; 8 D. P. C. 99; Jacob's Fisher's Digest 2608.

Defendant's motion refused and plaintiff's motion granted.

ORPHANS' COURT.

Lohr's Estate.

Will—Codicil to—Effect of—Charitable use.

Testatrix in the body of her will bequeathed the residue of her estate to charitable uses. Within a month prior to her death she made a codicil to the will. HELD, That the codicil so made did not bring the bequest in the will within the Act of 1855.

The Act of 1879 enacting that "every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will," relates to the subject of the devise and bequest, and not the object of the gift.

Exceptions to the report of S. H. Forry, Auditor.

The question of law involved is given in the Court's opinion.

Wm. C. Chapman and C. M. Wolff for exceptions.

Wm. Hay for report.

April 21, 1883. GIBSON, A. L. J.—The Court is asked to reverse the decision in this distribution, awarding to the Home, Frontier and Foreign Missionary Society of the United Brethren in Christ, the sum of $12,389.84, under the following clause in the will of Christiana Lohr, made the 6th day of September, 1887: Item. All the rest, residue and remainder of my Estate, Real, personal and mixed, of what nature, kind and quality soever, the same may be, and not herebefore given and disposed of, after paying my just debts (if any) legacies, funeral and other expenses, I give and bequeath unto the Home and Foreign Missionary Society of the United Brethren in Christ, said society being organized in the State of Ohio." The ground upon which this is asked is that the testatrix made a codicil, written on her will, on the 14th day of March, 1881, within one calendar month of her death, which event occurred on the 4th day of April, 1881. It is contended that this codicil was a republication of the will, and that hence the will speaks from the date of the codicil, and the legacy is void by the provisions of the 11th section of the Act of 26 April, 1855, P. L. 332. Bright. Purd. 1477, pl. 22, which enacts as follows:

"That no estate, real and personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two creditible, and at the time disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto, shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

By the first section of the Act of June, 1879, P. L. 88, it is enacted as follows:—"That every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Hence, by parity of reasoning, if the period from which a will speaks is to govern, in such a case as this, there can be no devise or bequest to a charitable use ever made, for the act says a will shall "take effect as if it had been executed immediately be-

fore the death of the testator." This first section of the Act of 1879, is an exact transcript of the British statute, 1 Victoria c. 26, (1837). It is said in Jarman on Wills, 186*, 291*, that the Statute relates to the subject of the devise or bequest and not to the objects of the gift, and, therefore, so far as our Act of Assembly is concerned, it may be said, that it is the object that is, under the conditions prescribed by the act of 1855, inhibited, and prevented from taking the bequest. But let us look at what is meant to the period from which a will speaks. That phrase had relation, for instance, at one time, to the capacity of the testator to pass by a general gift his real and personal estate, "and, accordingly, such a gift, in regard to the real estate, was read as a gift of the property belonging to the testator at the time of the execution of his will (he being incapable of devising any other,) and as to the personalty, as a disposition of what he might happen to possess at the period of his decease: Jarman 287.*— Thus it appears that as regards general bequests, wills always did speak from the death of the testator. As regards general devices of real estate, we have had since the Act of 8 April, 1833, a provision that after acquired real estate shall pass by a will. The 11th section of that act has been cited by text writers as an equivalent to the 24th chapter of the British Statute; Jarman, 288,* n. Why it was thought necessary by the legislature to enact, so late as the year 1879, the words of that 24th chapter, I do not know: to all intents and purposes our reformers in the matter of wills had preceded them.— At any rate it has always been understood as a general rule that a will speaks from the death of the testator, unless its language indicates a contrary intention.

The question recurs then to the effect of a republication of a will by a codicil. There is a class of cases about which there can be no contention. Such as Neff's Appeal, 12 Wright 501, in which the question was whether the codicil revoked a second will and republished an earlier will on which it was written. To the same effect in principle is Tinnard's Appeal, 12 Norris 313. But we find that in all other cases, since the modern statutes of wills, which may arise out of the execution of a codicil, questions regarding the intention of the testator are involved to such an extent as to qualify the rule invoked here materially. Instances of this are shown in the cases of Coale *v.* Smith, 4 Barr 376 and Alsoph's Appeal, 9 Barr 374, in both of which the opinions were delivered by Mr. Justice Bell. In the last mentioned case this distinction is shown: that though for some purposes, a will and codicil are to be regarded as making but one testament, they will not be considered as a single instrument, where a manifest intention requires otherwise.

An instance of a codicil and will being separate instruments and one testament, is illustrated in the cases of Hamilton's Estate, 24 P. F. S. 69, and Bradish *v.* McClellan, 40 Leg. Int. 110. In the latter case the codicil was held to attach itself to whichever of two wills become operative in a certain contingency. In the former case the same codicil was held not to affect the charitable bequests in the will, which was declared operative by the codicil.— That the later will was prevented by the codicil from being a revocation of the earlier will. That the earlier will was never republished because it was never revoked by the later will, and therefore, it spoke from its date. This is the idea suggested above as to the principle of Neff's Appeal, and the effect of a codicil in republishing a will that would otherwise be revoked. The first will in Hamilton's Estate would have been revoked by the second will, but for the codicil which gave it life, and yet it did not affect the validity of the charitable bequests in the first will. This could be only on the ground of its being a separate instrument. Bradish *v.* McClellan, held the codicil to be part of

the same testament as the first will, and I understand the court not to question the validity of the charitable bequests, but to affirm the decision, for the remark is made that they were held valid, without comment. The question was directly in view of the court though not before them.—Hamilton's Estate does not ignore the power of the codicil to put in force the first will, but declares it a separate instrument from it. Bradish *v.* McClellan only declares the codicil a part of the same testament as the first will.

The question raised here as to the period from which this will speaks, based upon the doctrine of republication by a codicil, would make void the charitable bequest given by the original will contrary to the intention of the testatrix.—The very act of republication, *ipso facto*, would make null and void that which republication by intendment of law reaffirms. I think the validity of the residuary bequest, above quoted from the will, and under which the auditor makes his award, is not affected in any way, by the codicil, and that it does not bring the bequest within the prohibition of the act of 1855.

The report of the auditor is confirmed.

SUPREME COURT.

Fetterman v. Robbins.

Under the Act of March 19th, 1804, incorporating the President, Managers, and Company of the Susquehanna and Lehigh Turnpike Road, the directors were bound to keep the road in repair and good condition; and when not in repair, as found upon the report of viewers appointed to examine the condition of the road, and notice of the same being given to the toll-keepers, they were not to exact any toll until the road was put in good repair, under a penalty for each collection, recoverable before a justice of the peace. A toll-keeper exacted toll after being notified of the condition of the road, and admitted the fact before a justice of the peace: HELD, that a good prima facie case had been made out against such toll-keeper, which could not be rebutted without affirmative proof that the condemned portion of the road had been put in order.

Error to the Court of Common Pleas of Luzurne County.

October 2, 1882. STERRETT, J.—The case, as presented in the transcript of the justice, is clearly within the jurisdiction conferred by the act of March 19, 1804, and there appears to be nothing in the record proper, or in the testimony before the court below, that would have justified a reversal of his judgment.

The remedy provided by the fourteenth section of the act for neglect to keep the road "in good and perfect order and repair" appears to have been strictly pursued. An inquisition condemning certain portions of the road were taken, returned, and duly served on the plaintiff in error, one of the company's gate keepers. The legal effect of that preliminary proceeding was to suspend the right of the company to demand or receive tolls on the defective portions of its roads, until, in the language of the act, they were put "in good and perfect order and repair." In addition thereto, that clause of the section on which the present action is founded declares if any gate-keeper shall take or attempt to exact tolls for such portions of the road as have been condemned, during the time the same shall continue out of repair, "such keeper shall forfeit and pay to the person who shall prosecute for the same the sum of five dollars, to be recovered before any justice of the peace as debts of equal amount are or may be by law recoverable." The language thus employed clearly indicates that the Legislature intended to avoid technicalities by providing a plain civil remedy for the collection of the penalty as often as it might be incurred. It is to be recovered as a debt of the same amount in an action before any justice of the peace.

The slight discrepancy between the transcript, which shows simply an action of debt, and the summons, in which it is styled "penal debt," is wholly immaterial. Taken as a whole, the records exhits a good cause of action. The inquisition given in evidence, and fully set out in the transcript, together with proof of the service thereof on the defendant below, and his admission before the justice that he thereafter collected toll, all of which are shown by the record, made a clear *prima facie* case against him, which could not be successfully rebutted without affirmative proof that the condemned portion of the road had been put in good order and repair before he demanded toll. That was not done, and the judgment of the justice was, therefore, in accordance with the evidence before him.

Judgment affirmed.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, APRIL 12, 1883. No. 6.

COMMON PLEAS.

Anstine v. Mayer.

New Trial—Reasons for—Weight of evidence.

Where the question at issue is essentially one of fact, and the case presents the ordinary conflict of testimony a new trial will not be granted on the ground that the verdict was against the weight of the evidence.

Even where the jury may differ in opinion with the court, it is no ground upon which to grant a new trial, where there is a conflict of testimony, or where the cause is submitted on the credibility of the witnesses.

Motion for a new trial.

The ground for the motion is given in the Court's opinion.

W. C. Chapman for motion.

H. L. Fisher, contra.

April 24, 1883. GIBSON, A. L. J.—The principal ground upon which a new trial was urged in this case was that the verdict was against the weight of the evidence. But the question at issue was essentially one of fact, namely, whether the tobacco delivered by the plaintiff to the defendant had been fraudulently watered. Many witnesses testified that the tobacco at the time of delivery was wet, and gave their opinions that it had been watered.—On the other hand, an important element in determining the fact whether it had been fraudulently watered or not was, the time when it could have been done. It was all in good condition when the defendant inspected it, just three weeks before it was delivered. It was moist then. The persons who bailed it, on the 25th of March, five days before delivery testify that it was done on a damp day and that they put no water on it. Defendants' witnesses say, if it was watered, it must have been done four, five or six days before the delivery. Besides it is in evidence that pouring water on into the bales could not be done, at least, not to any extent to injure the tobacco. The case, therefore, presents merely the ordinary conflict of testimony, in which event, the credibility of the witnesses on either side is for the jury. The truth of the testimony does not depend upon a preponderance in the number of witnesses. And again, no matter how wet the tobacco may have been, whether it had been made wet by watering or not, was a fact to be arrived at by a process of reasoning, a deduction from facts testified to. The witnesses of the defendant also differ as to the degrees of wetness, and the process of sweating, which is natural to the tobacco packed, was not improbable. Taking the whole case together, there is by no means, that clear and decisive proponderance of evidence, which is necessary to entitle a party to a new trial; Ludlow *v.* Ins. Co., 2 S. & R. 119.

We submitted in strong terms the full weight of the defendant's testimony to the jury, we also submitted the case of the plaintiff in such terms as left the points favorable to each fairly to the jury. Not to speak of my own leanings as to the correctness of the verdict, on the one side or the other, there is scarcely a cause tried, in which the parties concerned, might not with equal propriety ask for a new trial if the verdict goes against either. Even when the jury may differ in opinion with the court, it is no ground upon which to grant a new trial, when there is a conflict of testimony, or where the cause is submitted on the credibility of the witnesses: T. & H., Sec. Sec. 749.

Rule discharged.

Smith v. Inners.

New Trial—Reasons for—Contributory negligence.

Where the defendant, through careless driving, collided with the plaintiff, it is no defence to an action for damages, that the plaintiff was deaf, and therefore did not hear the defendant's cries.

The rule applicible to driving over a rail road track does not extend to an ordinary road.

Motion for a new trial.

S. H. Forry and W. C. Chapman for motion.

John W. Bittenger, contra.

April 24, 1883. GIBSON, A. L. J.—This case involved simply a question of

careless driving. It was submitted to the jury to say, whether or not, there were facts and circumstances, in the case, which could throw the blame upon the plaintiff, or make it appear to be an inevitable accident, in either of which events, the plaintiff could not recover. One who fails to exercise ordinary care in riding or driving is liable for all damages thereby occasioned; Strohl *v.* Levan, 3 Wright 177, subject to the qualifications just mentioned. The facts were not such as to permit the court to take the case from the jury.

The ground upon which a new trial was chiefly urged, was that of an inadequate instruction to the jury in regard to an infirmity of the plaintiff, submitted in the fourth and fifth points of the defendant. It was contended that the fact of the plaintiff being a deaf man who could not hear the defendant's approach, nor his calls of warning to get out of the way, was a circumstance so extraordinary, concurring with defendant's fault, as ought to relieve the defendant of all liability in the suit. This instruction could not have been given in view of the fact that the defendant testified that he did not see the plaintiff until he was within a few steps of him, and that there was then no time to stop the sled, and that the warning to get out of the way was not in time to enable the plaintiff to do so, and that the defendant might have seen the plaintiff had he been looking in time enough to have avoided the accident. It is not certain, from the testimony, that the hallooing to each other of those on the sleds occured at this point, yet it was submitted to the jury as though it had.

It was also contended that the plaintiff being deaf and necessily aware of this his defect, he had greater reason for caution and care in advancing; and that under the circumstances the plaintiff was guilty of such negligence himself, in being in the way of danger, and not keeping a sufficient lookout, as entirely defeats his action against the defendant. This instruction could not have been given in view of the plaintiff's testimony that he did look out, how often—was for the jury to determine.

The rule applicable to a place of danger, such as being on a railroad track, cannot be said to apply to an ordinary road, and I still think, as I said in the general charge, that the fact of the plaintiff being deaf or feeble in any way, does not excuse any want of care on the part of the defendant.

Rule discharged.

Sutton v. Coover.

Pleading—Special plea—Validity of.

In an action for trespass on the case for the killing of a dog, the defendant filed a special plea admitting the killing, but alleging that the plaintiff's dogs had been in the habit of worrying his (defendant's) cattle, and that on the night of the alleged trespass some dogs were worrying his cattle, and therefore in the dark he shot and wounded the said plaintiff's dog, and further averring that if any damage was thereby occasioned to the plaintiff it was occasioned by the unlawful trespass and depredations of the said dog. HELD, to be a valid plea.

The matters of fact set out being certain to a common intent, and forming one connected proposition, the plea not objectionable in form.

Motion to strike off special plea.

The special plea filed was as follows:

"And for a further plea in this behalf the defendant says that just before the time of the alleged shooting of plaintiff's dog by defendant and for a long period prior thereto plaintiff's dogs were in the habit of worrying and annoying his cattle and sheep, hogs and poultry, and that he was frequently compelled to rise at night and drive them away, and that on the night of the alleged shooting dogs were worrying his live stock in the barn yard, and if he had not fired the shot some of them would have been killed, wherefore the said defendant did then and there shoot out of his room-window in the dark as he lawfully might for the cause aforesaid and in so doing did necessarily and unavoidably wound the dog of said plaintiff doing no necessary damage to said plaintiff on the occasion aforesaid. And so the said defendant saith that if any hurt or damage then and there happened to the said plaintiff by reason of the loss of his dog the

same was occasioned by the unlawful trespasses and depredations of plaintiff's said dog on his the said defendant's premises, which are the supposed trespasses in the introductory part of his plea mentioned and whereof the said plaintiff hath above complained. And this the said defendant is ready to verify."

The motion to strike off is:

"The plaintiff by his counsel respectfully moves the court to strike off the special plea filed by the defendant on the 9th day of October, 1882, for the reasons that it is uncertain, evasive, argumentative and contains nothing that ought to prevail the defendant as matter of defense."

H. L. Fisher for motion.

Jos. Ritner and G. W. Heiges, contra.

April 24, 1883. GIBSON, A. L. J. The special plea filed in this case does not lack any quality essential to its validity as such. It is in justification of the trespass charged in the narr. It admits a *prima facie* right of action in the plaintiff, 1 Chitt. Plead. 557, (1833); but discloses matter tending to destroy that right of action. Nor is the plea objectionable in the manner of its recital of facts. As they are set out they form one connected proposition, and are certain to a common intent; Ibid. 565.—The plaintiff's ground of action being the shooting of his dog by the defendant, the question whether the circumstances under which the dog was shot, are or are not a justification of it, is the matter to be tried.

Rule discharged.

Hartman v. Hellam Township.

Pleading—Special plea—Validity of.

Plaintiff brought suit against defendant for injuries occasioned to plaintiff and his horse, by reason of a road in said township not being opened and graded to its full width, and the absence of guards along a certain embankment. Defendant filed a special plea, alleging that the road was open of sufficient width for travelling by persons using ordinary care, and that the plaintiff was not in full control of his team at the time of the accident, and negligently permitted them to occasion the injuries complained of. HELD, to be valid.

Motion to strke off special plea.

The following special plea was filed in this rule:

"Pleas to the declaration of plaintiff filed Dec. 13, 1882.

1. The defendant pleads *not guilty*.

2. And for a further plea in this behalf the said defendant saith that the said plaintiff ought not to have and maintain his said action against the said defendant because saith that the said public road in the plaintiff's declaration mentioned, at the place where the said injury of the said plaintiff is alleged to have happened at the time of the happening thereof was well and sufficiently opened and graded to the width of twenty feet or thereabouts, and was level from side to side and in sufficient repair for all citizens of the Commonwealth using ordinary care with their horses, carriages, buggies, carts, wagons and other vehicles, to pass, repass, and travel over with ease and safety; and the defendant avers that the said plaintiff at the time and place aforesaid, was not in the immediate control of his said team, and negligently permitted his said team to go unguided up and upon the bank in the said plaintiff's declaration mentioned, and to run and draw his said wagon up and upon the said bank and to upset the said wagon and load of wood right in and upon the travelled track of the said public road and that at the time and place aforesaid no other wagon, or other vehicle was passing or occupying any part or portion of the said travelled track of the said road, and that there was then and there no embankment or declivity requiring any guards for the safety of travellers using ordinary care. And this the defendant is ready to verify, &c. Wherefore he prays judgment, &c."

The motion to strike off was as follows:

The Court is respectfully asked to strike off the defendant's special plea in the above case for the following reasons:

1. The allegation that the public road in question was opened to the width of "twenty feet or thereabouts" is not pertinent to the issue, and not a defence if true, the width of the road as confirmed by the Court and ordered to be opened being 30 feet.

2. The said special plea with the exception of the above mentioned allegation of immaterial matter amounts simply to the general issue.

3. The plea is defective by reason of its being argumentative.

John W. Bittenger for motion.

W. C. Chapman, contra.

April 24, 1883. GIBSON, A. L. J. The plaintiff has sued in case of injuries to himself and horse, occasioned, as he avers in his narr., by the negligence of the defendant in not sufficiently opening and grading a certain public road according to law, and to its full legal width as fixed by the court, and in not erecting guards along an embankment of the same for the safety of travellers; by reason of which neglect his wagon was run upon a bank and upset, and the injuries complained of were sustained. The defendant has filed the plea of the general issue, and also a special plea setting out that the public road in question was sufficiently opened to the width of twenty feet or thereabouts and was level and in sufficient repair, and averring that the plaintiff negligently permitted his team to go unguided up the bank by which the wagon was upset, and negativing the allegation that there was any embankment requiring guards for the safety of travellers using ordinary care.—This plea raises sufficiently the issue of fact, whether the injuries arose from the fault of the township in the original construction of the road, or whether they were occasioned by the negligence of the plaintiff himself: Perry Tp. *v.* John, 29 P. F. S. 412. This issue is not improperly raised by special plea, and can be met by a general replication denying its allegations.

Rule discharged.

Orphan's Court Practice in Pennsylvania.

Rees Welsh & Co., the well-known law book publishers of Philadelphia, have just issued the first volume of a new work by Hon. D. L. Rhone, Judge of the Orphans' Court of Luzurne County, with the above title. The volume contains nearly 800 pages of text, with copious notes, and a complete Table of Contents and Index.

The scope of the work is indicated by its title, and the learned author has written a book of which he may well feel proud. In a clear and comprehensive manner he has arranged all the decisions relating to Orphans' Court practice, and there does not seem to be room for any addition or improvement on his work.

In the preface, the author says:

"My chief aim has been to cull from the great body of our law that which specially relates to the settlement of the estates of decedents and the management of the estates of minors and *cestui que trusts*, in the several courts of this State. In this endeavor my principal purpose has been to state general principles and to illustrate the practice, rather than to report exceptional cases, so that in many instances the syllabus of the case referred to does not sustain the statement made, but the proposition will be found either in the opinion of the court or the history of the case."

"Gentlemen of the profession, you have been for a long time demanding a book specially devoted to the Orphans' Court practice, and you alone can say whether or not this is the one you have been looking for. If it does not meet your expectations, I hope you will find it of some use."

Among the York county cases referred to, are: Beaverson's Estate, 1 YORK LEGAL RECORD 173; and Graham's Estate, 2 ib. 186.

Also, the Adams county case of Plank's Estate, 1 ib. 148.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, APRIL 19, 1883. No. 7

SUPREME COURT.

Appeal of John Jones.

The 3d section of the Act of 1872 does not give a lien on chose in action in favor of wages claimants; the lien is limited to such property as is subject to seizure and sale on execution.

Moneys received from the insurance of a woolen mill must be distributed pro rata among all creditors; the wages of operatives in the mill are not entitled to a preference in such distribution.

The proceeds of a crop of wheat, growing at the time the labor of operatives was performed and severed, by sale or otherwise, before the real estate is sold, is properly applicible to the payment of their wages, in preference to the lien of a judgment on the land. That the severance was produced by the sale of a receiver will not affect the rule.

IT SEEMS that the proceeds of a grass crop, grown after claims for wages had accrued, should, however, be awarded to lien creditors in their order.

IT SEEMS, ALSO, that the proceeds of old iron, which had formed a part of the machinery of a mill destroyed by fire, should be distributed as real estate.

Certiorari to the Court of Common Pleas of Chester county.

Robert Preston was in 1878 the owner of woolen mills and other real estate, which was encumbered with liens. In that year he entered into copartnership with one Firth, and the business of manufacturing woolen goods was carried on by them under the firm name of "Robert Preston." The stock and machinery in the mill, and the real estate became, by virtue of the articles, partnership property. The firm failed, and on February 12, 1881, ceased operations. On the same day Preston made an individual assignment for the benefit of creditors. On June 22, 1881, a receiver of the firm was appointed by the court. On June 1, 1881, the mills were destroyed by fire, having been insured the previous January in the name of Robert Preston.

The assets for distribution were, (1) the proceeds of the sale of corn, grass and wheat; (2) the proceeds of the sale of old iron which had formed part of the machinery of the mill destroyed by fire; and (3) moneys received from the insurance on mill. The corn was harvested in the fall of 1880; the wheat was sown the same fall; and the grass was grown in the spring of 1881. Both wheat and grass were sold by the receiver as personal property. The operatives in the mill claimed a preference out of all these funds, under the Act of 1872. The wages of these claimants accrued chiefly in December, 1880, and January, 1881.

The court below, FUTHEY, P. J., applied the proceeds of the grass and old iron to lien creditors, but allowed a preference out of the proceeds of the corn, wheat and insurance moneys, to the wages claimants.

This appeal was then taken by John Jones, a lien creditor.

March 19, 1883. STERRETT, J. The subject of complaint in the first and second specifications is that the amount realized by the receiver from the sale of corn and the growing wheat crop, was erroneously awarded to the appellees on their respective claim for wages, under the Act of 9th April, 1872, to the exclusion of appellant's claim.

The corn was grown on the land bound by appellant's judgment; but having been garnered in the fall before the receiver was appointed, it came into his possession as personal property of the insolvent firm, in whose service the wages claimants were employed. The wheat, having been sown the same fall, was a growing crop at the time the wages were earned, and in that condition it was afterwards sold by the receiver as personal property. The learned judge was clearly right in so treating it.—Growing crops, the product of agriculture, pass to the administrator or assignee for the benefit of creditors, as the case may be, and are liable to be seized and sold on execution as personal chattels of the debtors; Patterson's Appeal, 11 P. F. Smith, 294; Hershey *v.* Metzgar, 9 Norris 217.—All that is required is that there should be, as there was in this case, a severance, by sale or otherwise of the growing grain, before the land itself is sold. It is quite clear that the appellant, a judgment creditor, had no lien on the growing wheat

crop or the products thereof. If he was interested in the proceeds of either it was only as a general creditor of the insolvent firm. As to the proceeds of the old iron, which had formed part of the machinery of the mill destroyed by the fire, and the grass crop, which, in an agricultural sense, was wholly grown after the claims for wages had accrued and while the land was in the hands of the receiver, the court, upon principles recognized in Altemose *v.* Hufsmith, 9 Wright 128; Reiff *v.* Reiff, 14 P. F. Smith 134; Bausman's and Herr's Appeal, 9 Norris 178, and other cases, very properly drew a distinction in favor of the appellant as a judgment lien creditor; but no question as to these items arise in this case.

As we have seen, when the wages were earned and the employers became insolvent, the corn and the growing wheat crop were personal property of the firm—chattels, not in any manner bound by the lien of pre-existing judgments, but liable to seizure and sale on execution. This being so, we are of opinion that, according to the true interpretation of the Act of 1872, the employees in the mill had a lien upon both, which adhered to the proceeds thereof in the hands of the receiver, and hence the court was right in awarding that part of the fund to them. The first section of the act provides that all moneys due for labor and services rendered by those belonging to either of the classes mentioned therein, "shall be a lien upon said mines, manufactory, business or other property, in and about, or used in carrying on said business, or in connection therewith, to the extent of the interest of said owners or contractors, as the case may be, in said property and shall be preferred and first paid out of the proceeds of the sale of such mines, manufactory, business or other property as aforesaid; provided that the claim of such miner, mechanics, laborer and clerk, thus preferred, shall not exceed $200." It is also provided in the 4th section of the act, "that no lien of mortgage or judgment entered before such labor is performed, shall be affected or impaired thereby." The 3d section of the act declares that "in all cases of the death, insolvency or assignment of any person or persons, or chartered company, engaged in operations as hereinbefore mentioned, or of executions issued against them, the lien of preference mentioned in the first section of this act, with the like limitations and powers shall extend to every property of said persons or chartered company."

This clearly gives the appellees a lien on the personal chattels of the firm, including the corn and growing wheat crop in question, and also upon the real estate, subject to the right of prior mortgage and judgment creditors. The first and second assignments are not sustained.

The question raised by the third and fourth assignments is whether the appellees had a lien also on the insurance policy or proceeds thereof. When the mill, machinery, etc., were destroyed, the policy became a chose in action, and the money afterwards realized therefrom came into the hands of the receiver as part of the assets of the firm. As has already been observed, the act gives the employees therein named a lien, not only on the real estate, but also on the personal goods and chattels of their employers; but we think it would be a strained construction to hold that it was intended to give them a lien on choses in action. There is nothing in the phraseology of the act or its supplements to indicate a legislative intention to extend the lien beyond such personal property as is subject to seizure and sale on execution. The Act of the 8th May, 1874, P. L. 120, postpones coal lease mortgages to the lien of wages mentioned in the Act of 1872. By act of April 20, 1876, P. L. 43, the wages claimants may, after the expiration of thirty days from any voluntary assignment for the benefit of creditors made by their employers, enforce the collection of their claims, just as if no

such assignment had been made; and if the assignee has sold the property, he may be compelled to file his account thereof forthwith. The last Act (June 12, 1878, P. L. 207) gives the employees a preference over landlords in all claims for rent of mines, manufactories or other real estate held under lease, where the lessee is the party employing the miners, mechanics, laborers or clerks, provided that these workman shall give notice of the nature and amount of their claims to the landlord or his bailiff before actual sale of the property levied on.

The language employed in the several acts appears to contemplate a lien upon the employer's real estate and such personal property as is ordinarily the subject of seizure and sale on execution or distress for rent, and not upon choses in action. We think therefore, that the learned judge erred in awarding the proceeds of the insurance policy to the labor claimants, to the exclusion of other creditors. That part of the fund is not subject to lien in favor of any class of creditors, and hence it should be distributed *pro rata* among all.

Decree reversed at cost of appellees and it is ordered that the record be remitted with instructions to distribute the fund in accordance with this opinion.

Dunkle v. Harrington.

Some of the personal property that had been levied upon and advertised for sale was loaned by the sheriff to a third party, the sheriff told the bidder at the sheriff's sale that the property loaned by him was to be sold with the other property in his actual possession. HELD, that the bidder could recover from the sheriff.

Error to the Court of Common Pleas of Clarion county.

January 2, 1883. GORDON, J. On the 15th day of June, 1878, a writ of *levari facias*, at the suit of W. P. Bratton against Johnston and McIntyre, was issued to B. B. Dunkle, as sheriff of the county, of Clarion, commanding him to sell a certain leasehold estate of the defendants as therein described. On the day of the sale, and just before the bidding commenced, inquiries were made by Harrington of the sheriff, concerning some four hundred feet of casing which had been upon the leasehold, but which at the time was missing. In answer thereto, the sheriff informed him that there was that amount of casing which belonged to the property; that he had loaned it to some one interested in an oil well on the Booth farm; that it was to have been returned before the sale; that it should be included in the sale, and that he would deliver it to the purchaser. He also repeated publicly that he would include the casing in the sale, and that he would deliver it to the purchaser. This is the testimony of the two Brennemans and of Charles Harrington. It is corroborated by the evidence of Miles Sloan, and is contradicted by no one except the defendant himself. Induced by this declaration and agreement of Dunkle, the plaintiff bid off the property for the sum of $385, and at once paid this amount to the sheriff's clerk.

The learned counsel for the defendant contends, that the evidence ought not to have been submitted to the jury for the purpose of establishing a personal undertaking on the part of the sheriff to sell deliver the casing. But why not? Had he as a private person been selling the property as his own, no one, we think, would contend that he would not have been bound by such a contract. His duty as an officer was a plain one; he had but to pursue the directions of his writ without undertaking either to sell or deliver what was not in his possession. Doubtless he would have so done but for the fact that he had previously and unwarrantably intermeddled with the property, and made himself personally liable therefor by loaning it to an operator on the Booth farm. Herein is found not only the reason, but the consideration for this anomalous contract. By this arrangement with a purchaser at his sale, the sheriff relieved himself from the undoubted obligation which he was under, to the plaintiff in the writ, to account for the casing which he had disposed of. If, then, this contract was made for his own benefit, why was it not personal, and why cannot it be enforced as such? We have as yet heard no reason which ought to induce us to adopt a contrary conclusion, and we therefore cannot agree to sustain the second and fourth assignments of the plaintiff in error.

Of the two remaining exceptions little need be said, as they are of no consequence. The writ of injunction, or prohibition, was properly admitted for the pur-

pose proposed, the contradiction of the defendant. It was directed to the sheriff and by him executed, and it might fairly be presumed that he knew its contents. In fact, however, an inspection of the paper shows it to have been of so little account as a matter of evidence that we may well wonder why its admission was thought worthy of an exception.

As to the ruling out of the parol proof of the contents of the advertisements, we may, as an abstract proposition, admit that that action of the court was wrong; nevertheless, as we cannot see how evidence of that kind could affect the case in any way, we will not consent to reverse on a worthless abstraction, and this the rather as the defendant successfully opposed the introduction of the very same kind of evidence on part of the plaintiff. The preceding acts of Dunkle as sheriff had really little or nothing to do with the main point of the case; the point on which alone it turned, the fact of their having been a personal contract at the time of the sale, by which he undertook to deliver the property to the plaintiff. Upon the question of that contract the character of the advertisements could have no effect; hence their admission or rejection was alike unimportant.

The judgment is affirmed.

COMMON PLEAS.

C. P. of Luzurne County

Mulligan v. Knickerbocker Ice Co.

Where the transcript is in other respects regular, and there has been a trial on the merits, and the judgment is less than one hundred dollars, and the process shows that the damages claimed were less than one hundred dollars, the court will not reverse because the amount of the claim is not set out on the transcript.

Certiorari.

The opinion of the court was delivered April 16, 1883, by

RICE, P. J.—The exceptions to this record were filed nine days before the argument court in November, 1882, instead of ten, as strictly required by the rule of court. But the third argument court has been reached, and it is now too late to move, for the first time, to have the exceptions dismissed because they were filed a day too late.

The jurisdiction of a justice of the peace is determined, in an action of trespass or of trover, by the amount of the damages alleged to have been sustained, or the value of the property claimed, and not by the amount of the judgment But where the transcript is in other respects regular, and the summons shows that the damages alleged to have sustained are less than one hundred dollars, and there has been a trial on the merits, and the judgment entered is for less than one hundred dollars, the failure to set out the amount of the claim on the transcript does not seem to us to be such a material irregularity as to warrant a reversal on *certiorari*. The case seems to be ruled by Miller *v.* Savage (2 Luz. Leg. Reg. 191). As to the authority for referring to the summons, we refer to Lloyd *v.* Sayer, (No. 205, October term, 1882, Mss.)

The proceedings are affirmed.

C. P. of Luzurne County

Miller v. Miller.

Divorce—Alimony pendente lite—Counsel Fees.

1. The wife petitioned for divorce on the ground of desertion; the husband's answer simply denied the allegation of the petition; HELD, that she was entitled to a reasonable allowance for counsel fees, etc.

2. A woman who is living in a state of adultery has no claim upon her husband for support, and where this is shown clearly the court will refuse on application for alimony pendente lite.

Rule to show cause why the respondent shall not pay the libellant a reasonable sum to provide an attorney and procure witnesses in her cause, and to maintain and support her *ad litem*.

November 27, 1882. RICE, P. J. We conclude, after a careful consideration of the evidence taken on this rule, that the application for alimony *pendente lite* ought to be refused. A woman who is living in a state of adultery has no claim upon her husband for support, and where this is clearly shown the court will, in the exercise of their discretion, refuse an application of this nature. The reasons for this rule are forcibly stated by Thayer, P. J., in Stock *v.* Stock (11 Phila. 324.)

The request for an allowance for counsel fees rest on a different basis. The answer of the respondent does not charge adultery against the libellant, and to meet the issue, as the respondent has seen fit to present it, she it entitled to a reasonable allowance to pay counsel and to procure the attendance of witnesses.

The application for alimony *pendente lite* is refused, but it is ordered that the respondent, within twenty days from this date, pay to the libellant, or to her attorney of record, the sum of twenty dollars as counsel fees, and the sum of five dollars to procure the attendance of witnesses.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, APRIL 26, 1883. No. 8.

SUPREME COURT.

Buehler's Appeal.

In a proviso to his will a testator directs the manner in which the net share of each child shall be ascertained.—Afterwards he revokes the bequest to R., as contained in two sentences of his will quoted by him in his codicil, but carefully avoids changing or annulling the mode in which the share of each child is to be ascertained. He then gives the share of his son R. to his son's wife. HELD, (reversing the court below), that the share to which R.'s wife was entitled to use the share which R. would have taken if his wife had not been substituted as a legatee in his stead.

Appeal from the Orphans' Court of Montgomery county.

October 2, 1882. STERRETT, J. After providing for the payments of his debts and bequeathing a portion of his estate to his widow, the testator, Martin Buehler, directed the residue of his estate to be equally divided among his children, of whom Robert M. Buehler was one, with this proviso, "that there shall be deducted from the share of each of my children, to whom I have made any advances, the amount of such advances." He afterwards revoked the devise to his son Robert by the following clause in the codicil, viz: "I do hereby revoke the devise to my son, Robert M. Buehler, in my said will contained and set forth in the following words, so far as they affect my said son, to wit: "And the rest, residue and remainder of my whole estate, real and personal, I give, devise and bequeath to such of my children as may be living at the time of my decease. I do hereby give, devise and bequeath the shares of my sons in my estates to them respectively, their heirs, executors, administrators and assigns forever." In the same connection he disposed of the share which Robert would otherwise have taken under the will as follows, viz: "And I do hereby give. devise and bequeath the share of my said son unto my daughter-in-law Mary, the wife of my said son, Robert M. Buehler, to her and hers," etc. The question is whether, under this devise of Robert's share to his wife, she is entitled to a full share of the estate, unaffected by advancements made to him by the testator in his lifetime, or whether in ascertaining her distributive share the advancements so made are to be deducted as directed in the proviso above quoted.

The learned auditor found that the advancements to Robert was in excess of a full share in the fund for distribution, and under his construction of the will and codicil thereto he refused to distribute anything to Robert's wife, holding that she was substituted as legatee in place of her husband, and thus occupied the same position he would have done if the codicil had not been executed. The learned judge of the Orphans' Court adopted the opposite view of the question, and held that her interest as legatee was unaffected by the proviso in relation to advancements.

The question thus presented is a very narrow one, and must be determined by the expressed intention of the testator as disclosed by his will. In the proviso above quoted he directs the manner in which the net share of each child shall be ascertained. He afterwards revokes the bequest to Robert as contained in the two sentences of his will quoted by him in the codicil; but he carefully avoids changing or annulling the mode in which the share of each child is to be ascertained. He then gives the share of his son Robert to his daughter-in-law.

What then is the share of Robert that is thus taken from him and given to his wife? It is the share that he would be entitled to if his wife had not been substituted as a legatee in his stead, and that is to be ascertained in the mode pointed out by the will. It follows that the first report of the learned auditor was correct, and should have been confirmed.

Decree reversed at the cost of the appellees, and it is ordered that the record be remitted with instructions to distribute the fund according to the original report of the auditor.

ORPHANS' COURT.

O. C. of Lancaster County.

The Seventh-Day Baptists, of Ephrata, Lancaster Co.

Trustees—Mode of conducting Elections—Usage.

Where the charter of incorporation of a religious society contains nothing as to the mode of conducting election of trustees, and there are no by-laws of the society regulating the same former usage and practice becomes the law in such cases.

The following is a short history of a legal contest, of which the following opinion forms a part.

The Society of Seventh-day Baptists of Ephrata, in Lancaster county, was incorporated by Act of Assembly approved the 21st day of February, 1814. This act provided, *inter alia*, for the election of seven

trustees, who were "to be elected on the first Monday of January in every fourth year after the passage of this Act, at the town of Ephrata, in the county of Lancaster." An Act of Assembly was passed on the 10th day of February, 1865, reducing the number of trustees from seven to three. The society, being possessed of considerable real estate in and around the town of Ephrata, it has become quite wealthy by reason of an increased revenue in the way of rents, the value of the real estate being greatly enhanced by the construction of the Reading and Columbia Railroad and the improvements in the town of Ephrata resulting therefrom. The government of the society was peaceable and harmonious until the year 1879, when an election was held which has caused a division in the society ever since. The 6th day of January, 1879, being the regular and appointed time for holding the quadrennial election, notice was posted on the "Saal" or meeting-house, that on that day between the hours of 12 m. and 4 p. m. an election would be held for trustees, of the Seventh day Baptists. Some of the members, dissatisfied with the management of the society, resolved on the election of a new board of trustees, and, as a result, two sets of trustees, of three each, were returned as elected.

On the 18th of January, 1879, both sets claiming to have been legally elected presented to the Orphans Court, as required by the charter, the election returns with certificates attached, together with their bonds prepared, asking for the approval of the same. The Court, after testimony taken and read, declined to approve either of the bonds, Judge Patterson delivered the opinion, but suggested that an election be held to elect trustees to fill the vacancy occasioned by any incompetency of any of the trustees to act. Whereupon notice was posted for the election to be held on the 7th day of July, 1879, where William Madlem, Lorenz Nolde and Jacob S. Spangler, were returned as elected.

The newly elected trustees filed their bond with sureties and asked the Court to approve the same. Testimony was taken and read on the argument after which Judge Patterson delivered an opinion approving the bond. Judge Livingston dissented and objected to the approval of the bond.

The new board of trustees not getting control of the property, filed a bill in equity praying that the defendants be enjoined and restrained from taking part in any way in the management of the property, &c., of the society. A master was appointed to take testimony and report, whereupon he dismissed the bill of complaint. The Court, upon exceptions to the master's report, sustained the exceptions and made the injunction perpetual. Judge PATTERSON delivered the opinion, Judge LIVINGSTON dissenting.

This decree was made May 6th, 1882. January 2, 1883, being the day for the regular election of trustees, as provided by the charter, two sets, one being Lorenz Nolde, William Madlem and Henry Sheaffer, and the other A. F. Madlem, J. J. Zerfass and T. Konigmacher, were returned, who at the same time filed their bonds, asking the Court to approve the same, whereupon the following opinion is:

May 2, 1882. PATTERSON, A. L. J.—In the matter of the bonds filed in said Court and asking said Court to approve the same. One filed January 2, 1883.—One filed January 3, 1883.

The Court, on inspection of the said bonds and the return of the minutes of election of trustees by the said religious society of "The Seventh-day Baptists," discovered that the members of the said religious society met in the "Saal." the house of worship of said society, on the 1st day of January, 1883, and held elections for trustees. By the 2d section of the Act of Assembly incorporating said society, it is provided "that the trustees shall be elected on the first Monday of January *in every fourth year* after the passing of said Act. That January last of 1883 was the first Monday of said month, was the end of the term of office of the former trustees, and the time at which, under the charter, a new board of trustees had to be elected.

This religious society has not been united or harmonious among its members for some years past but it is distracted by unhappy fueds. Hence there were two distinct elections held by the members of said society, on the said 1st Monday of January last, at the same place.

An Act of Assembly passed subsequently to the original Act of incorporation, reduced the number of trustees from seven (the number in the original Act) to *three* and therefore but three such officers can be elected to manage the business of the society.

But instead of *three* persons having been returned as trustees duly elected

there are six persons so returned—each of the two divisions of the members of said society having met and elected three trustees, and each set have filed their bond in this Court and ask that they be approved. The aforesaid subsequent Act amending the act of incorporation, and passed and approved the 10th day of February, A. D. 1865, provides that the three trustees elected, "before entering upon the duties of their office shall respectively give bond with sureties to be *approved* by the Orphans' Court of Lancaster county, for the faithful performance of the trust, &c.

In order to conserve the welfare and best interests of the said religious society, it manifestly becomes the duty of the Court to take action in the premises—to approve the bond of one set of trustees. Without such approval neither sect, according to the provisions of the Act just quoted, can enter upon the duties of their office. Necessity dictates that there should be a board of trustees to manage the business of the society. The property of the society consists of real and personal estate—the real estate of several tracts of land and tenements; leases of the same to be made, rents collected, the "Saal," the houses occupied by the members of the society for worship, must be kept in order and opened and closed in order to accommodate the worshippers, and the funds and profits of the real estate of the society, when collected, to be appropriated, as the Act of incorporation directs, to "provide for the comfortable support and maintanance of the in-door members of the society and the aged. The duties of the trustees, if properly performed, are onerous and impose great responsibility, and cannot safely be postponed.

The question then arises which set of trustees, returned to this Court, should have their bond approved. It is not disputed that the bonds filed by each set of trustees are both ample and the sureties on both are abundantly responsible. Which bond should the Court approve? The bond filed in this Court January 3d, 1883, by Lorenz Nolde, Wm. Madlam and Henry Sheaffer as trustees is ample. We find, on inspection of the election returns filed in this Court, that the said three persons received the votes of twenty-four of the members of said society for the office of trustee, a majority of all the votes cast by the members of the society for candidates for that office; find that due notice of the time and place of holding the election, at which the above three persons were elected, was given, namely, a written notice of time and place, signed by the president of the board of trustees, posted on the door of the "Saal," and a copy thereof placed on a post inside of the "Saal." That was the mode of notice adopted by the long *usage* of the society. It being a religious society, and its Act of incorporation being silent as to the mode of conducting elections of trustees, and the corporation not having by by-laws directed the manner of elections, *usage* became the law: 8 Harris 484, Joker *v.* Commonwealth. The said notice was signed too, by the president of the board of trustees in office and in possession of the property of the society.—The meeting thus called organized at 11½ o'clock, according to the notice given and according to the usage of the society, by electing a judge, inspector and clerk, as officers of the election, and thus organized, cast twenty-four votes for the said three persons, to wit: Lorenz Nolde, Wm. Madlam and Henry Sheaffer as trustees, and they are returned as trustees, duly elected, of the said society, and as it appears by a majority of all the votes cast by the members of said society for trustees — Said three persons have, therefore, the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law: 11 Wright 296, Kerr *v.* Trego. The Court, therefore will and does hereby decree an approval of the said bond filed January 3d, 1883 in the Orphans' Court.

The bond filed January 2d, 1883, by A. F. Madlam, Jas. J. R. Zerfas and T. Koningmaher, as trustees, is not approved by this Court, for by an inspection of the election returns filed in this Court, January 15th, 1883, that the said three persons received but seventeen votes of the members of said society for the office of trustee, not being a majority of all the votes cast for candidates for that office. We find also that the members who cast the said seventeen votes met and organized after 12 o'clock, noon, in the "Saal" and then held their election as aforesaid; that when the said seventeen members met and organized and cast their votes, the meeting called according to the usage of the society as aforesaid, at 11½ o'clock, had organized and were receiving votes, and its officers were qualified to hold the election, having maintained the forms of organization according to the laws and usage of the society. The meeting of the

seventeen members and second organization was entirely irregular and without authority of law or usage, and of course its return and certificate of election was absolutely null and without effect: 8 Harris 484, Joker *v.* Com. The said last three persons were not legally elected and their bond should not be approved.

The conclusion of the Court, as hereinbefore expressed, does not affect the rights—the right of title to the office of trustee. In this proceeding, the title to that office cannot be determined. That right can only be determined by *quo warranto*, the mode prescribed by law, and if the three persons who are prevented, by the non-approval of their bond from entering upon the duties of the office of trustee, think they are injured, they can evoke the remedy suggested.

[Judge LIVINGSTON dissents, and objects to the approval of Nolde et al. bond.]

Supreme Court Proceedings.

The seven Supreme Court Justices possess an austure and dignified mien, and many a neophyte trembles and stammers in his initial effort, but soon discovers that they are more benignant than they look. Until a year or two ago, it was the custom of the Judges to ply the attorneys with such a succession of enfilading interrogatories and hypothetical legal propositions, whereby the most learned and accomplished lawyers would sometimes be embarrassed and discomfited. One of the ablest of our bar (now deceased) when a clinching and unanswerable legal point was put to him, would elude it by stating that he would come to it presently, but he always took his seat without coming to it. Another when in this predicament usually got his thumb under his suspenders and jerked and pulled until relief was afforded by a cessation of the judicial bombardment. Another however got his revenge by talking so long and tediously that every Judge left his seat except the Chief Justice, and he couldn't without adjourning the Court. It is needless to say the long-winded attorney lost his case.

As soon as the argument of a case is concluded, the Chief Justice calls the next case on the printed list. The printed paper books of both sides are handed to the Judges who hastily persue them so as to get an inkling of the points in controversy, when the Chief Justice sings out, "who opens this case?" The counsel for plaintiff in error or appellant then rises before the seven august judicial dignitaries who all scrutinize him as if searching to discover from what species of the animal creation he descended. The counsel generally begins with an abbreviated history of the case, after which he dives into the whirlpool of law in which, when in an uphill contest, he flounders until his allotted time expires. If of a vain self-confident and inflated nature, he sits down wreathed in smiles at the recondite legal lore he has flung into the presumed vacant places in the judicial craniums. His imperturbable spirit is not shocked at the fact that after he has fanfaroneded but a few minutes, the Justices put their heads together nonchanantly, or seriously discuss the question at issue, and pay about as much attention to the remainder of his argument as if it was the product of an automatic fog horn. Since the Court has ceased asking questions of the attorneys, the self-sufficient lawyer is safe in his comtemplations of how much law he taught the Court and of his own legal profundity and perfection. If an attorney becomes offended when the justices hold their pow-wows, and stops to reclaim their attention, the Chief Justice orders him to proceed, saying that they are listening to his argument but immediately thereafter relapse into their wanton practice. In the Supreme Court there is no inspiration for the orator who is dependent for his flights upon the plaudit or melted attention of his hearers. Seven statues could not be colder or more earless. That they care little for oral argument is evidenced by these unmistakable manifestations. After the adjournment of the Court at 3 P. M., the justices repair to their respective homes in the city—where the printed arguments are pondered over; and when in subsequent consultation a decision is arrived at, the Chief Justice designates one of their number to write the opinion. The Supreme Court of late years sticks less to the bark than formerly. Very often an attorney is certain of winning an unjust cause on the ground that the previous rulings of the Court are in opposition to his side of the case. But every case has its distinguishing feature, and that feature may make his cause inequitable and unmeritorious. In such cases the Supreme Court rightly tramps down technicalities and overrides precedent in order that it may reach substantial justice.—*York Daily*.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAY 3, 1883. No. 9.

SUPREME COURT.

Spangler vs. The Pennsylvania Mutual Aid Society.

Insurance—Construction of Act of April 8, 1868.

Suit may be brought in the county where the subject of the risk insured against was domiciled or located, and the summons may be served on the company in any other county of the Commonwealth in the manner provided by the original Act of April 24th, 1857.

Error to the Court of Common Pleas of York county.

The action is covenant, brought on the second day of August, 1881, to 41 October Term, 1881, on a certificate of membership issued by, and under the corporate seal of defendant in error, returnable on the first Monday of September, 1881.—The præcipe directed the summons to be directed to the Sheriff of Dauphin Co., Pa., where the defendant in error had its home office. The summons was sent to said Sheriff, who made the following return: "1881, August 8th, served personally on W. S. Rutherford, President, and J. F. Eaton, Secretary, of the Pennsylvania Mutual Aid Society, defendant, and gave to each of them a true and attested copy of this writ, and made known the contents. So answers A. Reel, Sheriff.—Sworn and affirmed before me. E. B. Mitchell, Prothonotary Court of Common Pleas of Dauphin County." Immediately after said service, Messrs. Cochran and Hay appeared "*de bene esse* for the purpose of moving to set aside service of summons in this case." August 24, 1881, narr and copy of policy of insurance in suit, &c., filed. On the 9th of September, 1881, the following petition under the corporate seal of the defendant was filed:

To the Honorable the Judges of the said Court:—

The petition of J. F. Eaton respectfully represents that he is secretary of the above named defendant; that said defendant is a corporation created for beneficial and protective purposes, and according to terms of charter located at Harrisburg, in the county of Dauphin, Penna.; thet said defendant, as your petitioner is advised and claims, is not a Life Insurance Company, within the meaning of the statute regulating service of process upon such companies, but that said defendant can be served with process only under the statutes regulating service of process upon corporations, generally, that the summons in this case has not been served in accordance with said statutes. He therefore asks that a rule be granted to show cause why the service of the said summons should not be set aside and vacated, and he will ever pray, &c. J. F. EATON.

Sworn to and subscribed before me this 8th day of September, 1881.

S. W. FLEMING, Notary Public.

On this the court granted a rule to show cause why service of summons should not be set aside, returnable the second Monday of October, 1881. At the December Argument Court said rule was argued, and on December 19th, 1881, the rule to show cause why service of summons should not be set aside was made absolute. By the Court. Thereupon an alias summons was issued to No. 70 January Term, 1882, and served upon the local and duly authorized agents of the defendant in error in York. A motion was entered to set sside this service, and upon the argument of the motion the rule was made absolute.

October 4, 1882. STERRETT, J. The single question involved in this contention is the construction of the supplement of April 8th, 1868, declaring that all provisions of the Act of April 24, 1857, relating to insurance companies, shall apply to life and accident insurance companies. The same question was before us in Quinn *v.* The Fidelity Beneficial Society: 4 YORK LEGAL RECORD, p. 33. It is here held that suit may be brought in the county where the subject of the risk insured against was domiciled or located, in the

summons may be served on the company in any other county of the Commonwealth, in the manner provided by the original Act. It appears by the declaration that the insurance was effected in York county, and Elizabeth Schlagenhaft, the subject of the risk, died there. The court of that county therefore had jurisdiction of the cause of action, and there was error in setting aside the service of the summons.

Decree reversed and *procedendo* awarded.

E. W. Spangler and W. C. Chapman, Esqs., for plaintiff in error.

Messrs. Cochran & Hay, for defendant in error.

Quinn vs. The Fidelity Beneficial Society.

Practice—Acts of April 24, 1857 and 1868.

Suit may be brought in the county where the subject of the risk insured against was domiciled or located, and the summons may be served on the company in any other county of the Commonwealth in the manner provided by the original Act of April 24th, 1857.

Error to the Court of Common Pleas of Schuylkill county.

This was an action of debt to recover on a policy of insurance or certificate of membership issued to Patrick Quinn by the Fidelity Beneficial Society, assuring the life of Francis Quinn, the plaintiff's father, in the sum of $2000. The plaintiff resided in Schuylkill county, and the corporation defendant was located in Lancaster county. The writ was directed to and served by the sheriff of Lancaster county under the provisions of the Act of April 24th, 1857, and the supplement thereto of April 8th, 1868, by virtue of which the plaintiff claimed to have a right to bring suit in Schuylkill county against the defendant. After service and return of the writ the defendant obtained a rule to show cause why the proceeding should not be set aside for matters of record, and this rule was made absolute by the court.—Exception was taken by the plaintiff to the ruling of the court and writ of error taken, assigning the ruling of the court as error.

October 2, 1882. STERRETT, J. In addition to the remedies thereto provided by law the Act of April 24th, 1857, Purd-802, pl. 53, declares it shall be lawful for any one who may have a cause of action against an insurance company, "to bring suit in any county where the property insured may be located, and to direct any process to the sheriff of either of the counties of this Commonwealth," etc.—Prior to the passage of that Act, the class of suitors, intended to be benefitted thereby, was obliged to seek redress in the courts of the county where the insurance companies might be located. This was generally attended with great inconvenience and expense in procuring testimony and securing the attendance of witnesses at points very often remote from their homes and the locality of this loss. In view of these and other considerations, and for the purpose of providing a suitable remedy, the Act of 1857 was doubtless passed; but, the language employed did not clearly include life and accident insurance companies, both of which were equally within the mischief that required a remedy, and hence the supplement of April 8th, 1868, P. L. 70, was passed, declaring that all the provisions of the former Act "shall apply to life and accident insurance companies."

While the legislative intention is not as clearly expressed as it might have been, we have no doubt the supplement was intended to authorize suits to be brought against life and accident insurance companies to the county where the person insured resided; where the subject of the risk insured against was domiciled or located.—A consideration of the reasons which evidently prompted its enactment also tends to sustain this view of the supplement. If it is not susceptible of that construction it is utterly nugatory and meaningless. Such a conclusion would not harmonize with the principle that every statute should be so construed as to give it operation, if the language will permit.

A remedial statute, such as this supplement evidently is, should receive a liberal interpretation in advancement of the remedy contemplated.

In view of these considerations, we are of opinion that the learned court erred in making the order complained of.

Decree reversed and *procedendo* awarded.

Bowersox's Appeal.

Decedent's Estates—Right of Widow to Administer.

The Act of Assembly giving the widow the preferred right to administer on the estate of her deceased husband, has not made an imperfect or defective education a legal disqualification.

A knowledge of the value of property, and the practical business transactions of life are sufficient to satisfy the requirements of the statute.

Appeal from the decree of the Orphans' Court of the county of Snyder.

October 2, 1882. MERCUR, J. John Bowersox died intestate. The Register granted letters of administration on his estate to the appellants, one of whom is a son, and the other a brother of the intestate. Susannah Bowersox claiming to be the widow of the decedent, and the right to administer on his estate, appealed to the Orphans' Court. After hearing the court vacated the letters issued to the appellants, and ordered that letters be issued to Susannah Bowersox. Two objections are made to the conclusions of the court, one to finding here to be the widow of the decedent, the other to deciding that she was a proper person to be entrusted with the management of the estate. We have carefully examined the evidence. We think it amply sufficient to justify the court in finding that she had been married to John Bowersox. Not only was there positive evidence ol the fact of their marriage; but they undoubtedly lived together for some twenty years; and the clear weight of evidence shows, as husband and wife during all that time. The apparent desire not to make the marriage generally known, is accounted for by the fact that all right to her former husband's property terminated when she ceased to be his widow.

The effort to prove her an improper person clearly failed. It is true she is rather illiterate. She cannot write. She cannot read printing unless it be in German. She had not a business education. In this respect she is like a large majority of the widows in this Commonwealth.—The Act of Assembly giving the widow the preferred right to administer on the estate of her deceased husband, has not made an imperfect or defective education a legal disqualification. A good mind and sound judgment; a knowledge of the values of property, and of the practical business transactions of life, are sufficient to satisfy the requirements of the statute. All these the appellee has. They will enable her to select competent assistants and able advisers. This will secure an efficient and faithful discharge of the trust.

It is further claimed, inasmuch as she has no separate property, that she comes within the prohibition declared in Cornpropst's Appeal, 9 Casey 537, by reason of insolvency. This is a misapprehension of the meaning of insolvency. It is not the mere absence of property liable to seizure on execution. It is the owing of debts in excess of the value of his tangible property. If he owes no debt he is not insolvent although he may have no such property. A young mechanic or laborer out of debt, just starting for himself, with no property but his knowledge, brawny arm, and energetic will, is not insolvent. Nor is one without visible property, owing no debt, who has acquired a learned profession, which he is about to follow. In all these cases, each may by industry, labor and economy, pay his way and contract no debts. Without debts there can be no insolvency. Poverty and insolvency are not synonymous terms.

The evidence in the present case does not show the appellee to owe a single dollar. If anything remains of her husband's estate after paying his debts, she

will have property. That will be in addition to the undoubted security which she must give before the letters are issued to her.

Decree affirmed and appeal dismissed at the costs of the appellants.

ORPHANS' COURT.

O. C. of Allegheny County.

Ward's Estate.

If a female under the age of twelve years enters into a marriage contract and ratifies it after she arrives at that age, it is binding upon her.

The powers of the register's court are now vested in the Orphan's Court, and when letters of administration are revoked by it, it should direct to whom the new letters should issue.

Appeal from the decision of the register granting letters of administration to Rufena J. Ward as the widow of the decedent.

April 19, 1883. OVER, J. The appellant alleges that Rufena J. Ward, to whom the register issued letters of administration on the estate of M. B. Ward, deceased, as his widow, is not the widow of the decedent, and claims therefore that the letters should be revoked. It is conceded by the appellee that prior to her marriage to the decedent she was married to William Randolph, who is still living: but she alleges that at the time ceremony was performed she was under the age of twelve years, that she never cohabited nor lived with him as his wife, and that the marriage was therefore void, and her subsequent marriage to M. B. Ward valid.

The burden of proof is upon the appellee to show that her marriage with Randolph was void. She has failed to do so, but on the contrary, there can be but little doubt from the evidence that she was over the age of twelve years when the ceremony was performed, and therefore capable of entering into a valid marriage contract. But even if this were not the case, there is very satisfactory evidence that she cohabited with Randolph after she arrived, according to her own testimony at the age of twelve years, which would be a sufficient ratification of the marriage to make it binding. It follows, then, that the subsequent marriage of the appellee to M. B. Ward was void, and that the letters issued to her must be revoked.

The question then arises as to whether this court should direct to whom new letters shall issue or only revoke the letters, leaving the register to appoint another administrator.

The 31st section of the Act of the 15th of March, 1832, Purd. Dig. 1255, provides that appeals may be taken from the judicial acts of the register to the register's court, and the 39th section, that such courts "may and shall do all such judicial acts in all matters lawfully brought before them as belong and of right ought to belong to the office of said register." The powers and jurisdiction conferred by these sections are in substance the same as by Act of 7th of June, 1812: Hood on Ex'rs, p. 473; under which it was held in Stoever *v.* Ludwig, 4 S. & R. 201, that when letters were revoked by the register's court, it should direct to whom new letters should issue. And as by the 22d section of Article V, of the Constitution of 1874, register's courts are abolished and their powers and jurisdiction are vested in the Orphans' Court, it is clear that this court should direct to whom the new letters should issue.

The appellant, under the intestate laws, is next of kin to the decedent, and is *prima facie* entitled to administer, and as there is no doubt as to his competency, the new letters must be issued to him.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAY 10, 1883. NO. 10

SUPREME COURT.

Fidelity Mutual Aid Association v. Leidig.

Mutual Insurance—Admission of Policy without application—Death proofs.

In a suit on a policy of insurance in a Mutual Aid Association, plaintiff proved notice to defendant to produce the application on which said policy was issued. Defendant failed to do so, alleging that the application was part of the records of another case, which was now before the Supreme Court. HELD, affirming the Court below, that the policy must be admitted in evidence, notwithstanding the absence of the application.

The President of the Association in a letter written to plaintiff's attorney stated that they did not "contest the claim, nor refuse to pay it up to this time, but prefer to await developments," and defer payment until another suit now pending against the companies on the same loss had been determined. HELD, affirming the Court below, to be a distinct admission of notice of the loss, and a waiver of proof otherwise necessary.

Error to the Court of Common Pleas of York County.

On the trial of the case in the Court below, plaintiff offered in evidence the Certificate of Membership, proved notice on defendant to produce application, proved payment of assessments, death of insured and furnishing of death proofs, and also offered in evidence a letter from the President of the Association, which is given in the Court's charge.

Defendant asked the Court for a compulsory non-suit, which was refused. Defendant then presented some points, which are given in the Court's charge.

The Court below (GIBSON, A. L. J.) charged the jury as follows:

Gentlemen of the Jury:—This is an action of covenant brought by Susan Leidig against the Fidelity Mutual Aid Association of Philadelphia.

The plaintiff has produced in evidence the policy of insurance, under the terms, of which the association covenants to pay her $2,000 on the death of her husband. She has proved to you the payment of the assessment that was sent her for collection through their agent in this place, it having been the only one that was ever sent to her. The premium was paid at the time the application was made. She has also proved the death of her husband, and that she furnished death proof.

It appears that the application and the death proofs had been offered in evidence in another suit brought by this same plaintiff against the New Era Life Association of Philadelphia, and those papers were attached to that record, and are now in the Supreme Court That suit is still pending.

Sufficient has been shown, in our opinion by the plaintiff in this case, to entitle her to recover a verdict for the amount she claims. And as regards any formality of preliminary proofs, as they are called, or any other matters which might, under some circumstances, be necessary for a plaintiff to prove, in order to establish his claim, they are in our opinion to be dispensed with on account of an acknowledgment of this claim in the letter written by the President of this association to the counsel of the plaintiff. That letter is dated October 13, 1880, and reads as follows:

"Edward W. Spanngler, Esq.,
Attorney-at-Law,
York, Pa.

Dear Sir:—Your favor of yesterday received. In answer have to say that we have concluded to defer payment of the have concluded to defer payment of the Ludwig claim until the suits now pending vs. the Insurance Companies have been brought to final judgment; if they be in favor of Mrs. Leidig, we will promptly and immediately pay the claim against our association, and for this purpose the assessment had been made in order that we may be able to do so. We neither contest the claim or refused to pay it up to this time, but prefer to await developments. I understand the suit in the United States Court will come up this month. Yours truly,

L. G. FOUSE, *President.*

The plaintiff has nothing whatever to do with any question of abiding the event of another suit. There is no evidence of any agreement on the part of herself to

abide such issue. nor is there any such offer in this case. It is an acknowledgment of a claim. We therefore instruct you, in the absence of any defence, either in law or in fact, that you render a verdict in favor of the plaintiff for $2,000.00 with interest.

But as matters of fact are to be submitted to the jury, there is evidence in this case, (in addition to the certificate) which has been given by the witnesses called upon the stand, and their credibility is to be determined by you. Unless you find anything in this case which effects their credibility, or anything which in your opinion will require you to find other wise, then your verdict would be for the plaintiff for the amount, with interest from July 3, 1880. If, however, on looking at the testimony of these witnesses, as you have heard them testify, you find anything to the contrary, your verdict will be for the defendant.

The defendant has requested the Court to charge the jury as follows:

1. That inasmuch as the certificate or policy of Insurance offered in evidence by the plaintiff shows upon its face as well as by Art. 18 from the By-Laws on the back thereof, that the application of J. W. Leidig on which said certificate issued was expressly made part of the contract of insurance, and the plaintiff having neither given said application in evidence nor made any sufficient legal proof of its contents, their verdict must be for the defendant.

Ans. We say to you in answer to this point that the certificate or the policy of Insurance was offered in evidence without objection, and that the application, which was given in evidence in another case and attached to the record now in the Supreme Court, was not produced here after notice having been given to the defendant to produce the same, so that it might be put in evidence with the policy. This point is therefore refused.

2. That inasmuch as the plaintiff has given no evidence, that good and satisfactory proof of the death of said Jacob W. Leidig was duly made and furnished to the satisfaction of the defendant, as set forth and avered in her declaration, and that as this is necessary to her right to recover, their verdict must be for defendant.

Ans. We answer this point by saying that if you believe the witnesses, the death proofs required by the defendant were furnished them; and as these death proofs after notice to the defendants were not produced here, and as it is shown they are part of the papers attached to the record now in the Supreme Court, this point is refused.

3. That the plaintiff has not shown that anything was due and payable at the time this suit was brought, there being no evidence to show that sixty days had been elapsed from the date of the periodical mortality assessment first ensuing the death of said J. W. Leidig, or that any assessment was laid upon the approval of this loss, or that the loss itself was approved, all of which was necessary to her right of recovery.

Ans. The policy of insurance itself we say to you shows the amount due at the time this suit was brought, and if the sixty days had not elapsed at that time, it would be a matter for the defendant to show and not the plaintiff; and as regards the assessment upon the loss, I think that the letter of the President of this Company defendant is sufficient and will answer any objection that may be made on that ground. This point is therefore refused.

4. That under the pleadings of this case the plaintiff is bound to prove to the satisfaction of the jury every material averment in her declaration, "that all the conditions and stipulations in said application of J. W. Leidig, and in the said instrument of writing mentioned, necessary to be complied with and performed according to the true intent and meaning of said cove-

nant were well and truly complied with and performed," and not having proved such compliance in every particular, she is not entitled to recover.

Ans. This point is refused.

5. Upon all the evidence offered in the case the verdict of the jury must be in favor of the defendant.

Ans This point is refused.

H. L. Fisher, N. M. Wanner and W. S. Campbell for plaintiff in error.

The admission of the policy, without the application, was error:

Lycoming Ins. Co. v. Sailer, 17 Smith 106.

Plaintiff should have proved the existence of the application:

Wharton on Evidence, Section 141.

And a search for it:

Greenleaf on Evidence, 558.

The declarations of the President were outside the scope of his authority, and therefore not binding on the defendant company:

Hackney v. Insurance Co., 4 Barr 187.

The death proofs were presented too late:

Com. Ins. Co. v. Sennett, 5 Wright 161.
Klein v. Franklin Ins. Co., 1 Harris 247.
Trask v. State Insurance Co., 5 Casey 198.
Edward v. Lycoming Mut. Ins. Co., 25 Smith 378.
Beatly v. Same, 16 Smith 9.

The President had no authority to waive death-proofs:

Hackney v. Insurance Co., 4 Barr 187.
Mitchell v. Insurance Co., 1 Smith 402.
Smith v. Insurance Co., 12 Harris, 325.
Shaefer v. Mutual Ins. 8 Norris 301.
Insurance Co. v. Perrine, 7 W. & S. 348.

E. W. Spangler and W. C. Chapman for defendants in error.

The plaintiff could not offer the application in evidence, because the defendant refused to furnish it.

The death proofs had been waived by the actions of the President, and the company were bound by his declarations:

Case v. Railway Company, 30 P. F. Smith 36.
Smith v. Farmers and Mechanics Ins. Co. 8 Norris 287
Eilenberger v. Protective Mutual Ins. Co., 8 Norris 464
Lycoming Co. Mutual Ins Co. v. Schollenberger, 8 Wright 259.

The question of "reasonable time" was for the jury:

Coursin v. Penna. Ins. Co., 10 Wright 323.
Chandler v. Commerce Ins. Co., 7 Norris 223.
Franklin Ins. Co. v. Updegraff, 7 Wright 350.

May 21, 1883. PER CURIAM The plaintiff in error was duly notified to produce the application. Failing to do so, there was no error in admitting the policy in evidence. The conduct of the president of the Association, as well as his distinct and express admission and declaration in writing, were a waiver of the proofs otherwise necessary. As there was really no evidence establishing a defence, the jury were correctly instructed to find for the plaintiff below unless they discredited his witnesses.

Judgment affirmed.

COMMON PLEAS.

C. P. of Lebanon County.

Bettinger v. United Brethren Mutual Aid Society.

Mutual Insurance—Assignment of Policy—Insurable Interest.

H., the beneficiary in a mutual policy, assigned the same to third persons, who had no insurable interest.—These assignees paid all assessments, and at the death of the insured, claimed the amount of the policy from the Association. Before payment, H. notified the Association that he claimed the amount of the insurance as heir-at-law of the insured, and contested the assignment on the ground of the assignees having no insurable interest, and the entire transaction being a speculation, and brought suit against the Association. HELD, That H. was estopped from setting up such a claim, he having entered into the arrangement of his own accord, and executed an assignment under seal to that effect.

April 4, 1883. JOHN B. MCPHERSON, A. L. J. This case was tried before the Court without a Jury under the provision of the Act of 1874. From the evidence before us we find the following facts:

1. On October 20, 1875, two certificates of membership or policies of insurance were taken out by Catharine Hettinger, in the defendant Society on her own life in favor of the plaintiff Joseph Hettinger, her husband, his heirs or assigns; one certificate or policy, No. 320 class 2, Division C. for $3000 and one, No. 621 class 1, Division B, for $2000. These policies or certificates are contracts of life insurance.

2. On December 23, 1865, Joseph Hettinger sold his interest in these policies to A. B. Baum and S. B. Lemberger, assigning No. 320 directly to them and No. 621 in blank with an agreement that the blank might be filled up with the names of such person as would purchase the policy from Baum and Lemberger. The latter policy No. 621, was afterwards purchased by Daniel R. Speck and John H. Speck. and their names inserted in the blank. On July 14, 1877, Baum assigned his interest in policy No. 320, to Ephriam Borgner. The defendant had notice of these assignments and approved the same on January 4, 1876, February 8, 1876 and July 16, 1877 respectively.

3. The plaintiff received from Baum and Lemberger $10, as consideration for his assignment of these policies. The assignments were not procured by fraud, but the assignees had no insurable interest in the life of Catharfne Hettinger and the assignments were made for speculative purposes.

4. The assignees paid to the Society the subsequent assessments and dues upon these policies as follows: on No. 320, the sum of $294.00 and on No. 621 the sum of $331.00.

5. On June 19, 1887, Catharine Hettinger died. Proof of death was made by the assignees and approved by the Society on July 9, 1878. On July 19th, 1878, Joseph Hettinger by his attorney notified the Society that all insurance on the life of Catharine Hettinger was claimed by himself and by her heirs and legal representatives, and that it should not pay to any one until the right thereto had been legally determined.

6. On October 9, 1878, the Society paid to Lemberger and Borgner on policy No. 320, the sum of $3000, less $90 for certain deductions, a total of $2910 and on the same date to Daniel and John Speck on policy No. 621, the sum of $2000, less $75 for certain deductions, a total of 1925.

7. Subsequently in June, 1881, the plaintiff demanded payment of these policies from the defendant, and upon its refusal to pay brought this suit.

CONCLUSIONS OF LAW.

Upon these facts the plaintiff claims to recover from the society the full amount of the policies referred to with interest, on the ground that his assignments were void, and that the defendant paid the money to the assignees after notice of his claim.

It is evident that the plaintiff cannot be regarded with favor in a court of justice. He was a party to a speculation on the life of his wife, received money for his share in the transaction, permitted without objection the assignees to assume his obligations to the Society and to pay more than $600, in consequence thereof, and attempted to repudiate his contract only when there was no more money to pay, and there seemed to be a prospect of money to get. Or to state the case in other words. having willingly, and for a consideration transferred the legal title to these policies and clothed the assignees with at least an apparent right to their proceeds, by virtue of which right and title they obtained from the Society the money it had agreed to pay, he now asks a court to declare his contract void not only as against the assignees but against the Society as well, and to say, that the latter was not justified in relying upon his contract under seal because he afterwards gave notice that he did not intend to stand by it. To succeed in such a claim, the plaintiff must call to his aid some rule of public policy or some rigid rule of law.

We have not been referred to any rule of law which compels us to declare the assignments void, and we are of opinion that the plaintiff cannot in this suit ask us to apply the rule of public policy which for bids wagering insurance on human life. It would not be proper to say, what the result of applying that rule would be if the plaintiff had proceeded against the assignees, and we do not intimate any opinion on the questions which might then arise: but it seems clear to us that the

plaintiff is estopped from invoking the aid of the rule in this suit against the Society. The case is analagous to that class, in which the question arises, which of two innocent persons must suffer, and the answer there is plain that, as between such persons, the loss must fall upon him whose act enabled the injury to be done: Garrard *v.* Haddan, 17 Sm. 85. The difference is against the plaintiff for here he did not *innocently* cause the injury of which he complains, but with full knowledge of the fact, which he now urges as making his assignments void, viz: the assignees' want of insurable interest, nevertheless transferred the policies to them and thereby shared in causing the Society to pay them the money. In effect he sent them to the defendant with his authority under seal to take his place, pay his dues and receive the proceeds of the policies; and surely, since the genuineness of the authority is not denied, he cannot be allowed to complain because the Society has exactly carried out its provisions.

If these principles are sound, the plaintiffs notice of July 19, 1887, did not better his position. The assignments were genuine, and had not been obtained by fraud, and his notice was a mere declaration that he intended to repudiate them, which the Society if it saw proper might disregard. Other questions might arise, if the assignments had been spurious and notice of that fact had been given before payment.

Upon the whole case, therefore, we find for the defendant.

To avoid misunderstanding, we desire to say that nothing herein contained is to be construed as deciding, or intimating an opinion upon any questions which may arise between the assignor and assignee of wager policies, or between the assignee of such a policy and the company; or as sustaining insurance of such a character. These matters are left untouched; the point we decide is, that the plaintiff is estopped from raising the question of insurable interest in this case, and that therefore he cannot recover from the Society in the face of his assignment. We have found the facts as stated in the last clause No. 3, in order that the plaintiff may have the case fairly reviewed, and not because we think they are needed to determine this issue.

The points of plaintiff and defendant are substantially answered by what has been said above and we need not repeat our conclusions in detail. The plaintiff's objections to the admission of the assignments in evidence are overruled.

We direct judgment to be entered for defendant if no exceptions are filed as provided by law.

Plaintiff excepts and bill sealed.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Agency—Fraud—Confidential relation between principal and agent.—A. without authority from B, obtained bids for the erection of a house on B's land, the bids including five per cent commission to A. Subsequently B authorized A to sign a contract for the erection of the house and to supervise its construction, agreeing to give him five per cent. commission for his services. In an action by A to recover his commission from B, *Held*, that it was for the jury to say whether the two contracts were independeht or not, and if they believe them to have been independent, fair compensation for the service rendered may be recovered.—*Galloway v. Walker.* (Delaware C. P.) 1 Delaware County Reports, 453.

Executors—Rents—Creditors.—Executors having been given authority in a will to rent, and if necessary, sell real estate of testator and appropriate proceeds to satisfaction of debts, rented the real estate for three years, and then relinquished possession under agreement of partition between residuary beneficiaries; *Held*, that as be-

tween them and such beneficiaries, they must account for rents due and uncollected on the transfer of possession of such real estate.—*McKee's Estate*, (Allegheny O. C.) 13 Pittsburgh Legal Journal, 392.

Criminal Law—Indictment—Where a defendant was charged in an indictment with having falsely pretended that a certain draft was a good and valuable draft, and that he had funds in the National Bank of Wooster, Ohio, to pay it, but the evidence only proved him to have said that there was money in the hands of defendant's partner, who lived in Wooster, Ohio, to pay the draft, and that it was a good draft. HELD, that the variance between the indictment and the proof was fatal, and after conviction upon the charge the defendant may have a new trial.—*Commonwealth v. Garver*, (Phil'a S. C.) 40 Legal Intellingencer 210.

Guardian—Rate of Interest—Where a guardian uses trust funds in his business, he is liable for interest thereon at the rate of 6 per cent. *Oliver's Estate*, (Allegheny O. C.) 13 Pittsburgh Legal Journal 385.

Negligence—Duty of Employer.—An employer in a dangerous business, is only required to furnish for his employees the ordinary and usual means of escape in accident.—*Marsden v. Haigh*, (Delaware C. P.) 1 Weekly Reporter 451.

Practice.—After a long lapse of time an attorney will not be allowed to withdraw his acceptance of service of writ, and appearance and plea, unless it be satisfactorily shown that the plaintiff would be in as good position as when the writ was issued.—*Heller v. Walker et al.* (Luzurne C. P.) 12 Luzurne Legal Register 138.

Surety—Liability of—The sureties on the bond of the cashier of an unincorporated association are not liable when this association becomes a chartered company with other privileges and limitations than those to be exercised by the private association.—*Bensinger et al. v. Wren et al.* (Schuylkill C. P.) 40 Legal Intellingencer 221.

Will—Construction of—Intention of testator.—A will should so be construed that the whole may, if possible, stand, and where two or more parts of a will are, with reference to the same subject matter, so totally repungent to each other that both cannot stand the latter must prevail. A testator is presumed to have an additional purpose for each additional expression, and to intend such a meaning as will give most effect to the context.—*David Flaud et al. v. Martin's Executors.* (Lancaster C. P.) 14 Lancaster Bar 207.

Will—Construction of.—Land was devised to four brothers, charged with a legacy, the interest thereof payable to E. for life, and the principal at her death to her issue, or should she die without issue, the same to "be and remain the property" of the four brothers. *Held*, that the devise of the land did not include the principle of the legacy; that the latter vested in the four sons at the death of the testator; and that the charge of the legacy did not merge in the fee of the real estate.—*Penock v. Eagles.* 2 Chester County Reports 34.

Will—Construction of.—Testator devised to his son a store on Water street. In another and subsequent item he devised the rest of his estate to his children and their issue, on the final settlement and distribution of his estate. In another and subsequent item he devised unto his executors "all my estate, real, personal and mixed, whatsoever and wheresoever, in trust for the purpose herein specified, and subject to the limitations and reservations in items before mentioned." HELD, that as by different parts of the will testator's intention was not to have a final distribution and settlement of his estate until his youngest son reached the age of twenty-five, that the rent of the Water street store was payable to the executors and not to the son prior to that time.—*Conrow's Appeal.* 40 Legal Intellingencer 221.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAY 17, 1883. No. 11

William Hay, Esq.

HAY—Died, on Sunday morning, May 13, at his residence, No. 122 West Market street, William Hay, Esq., aged 47 years, 8 months and 28 days.

The following extracts are made from the YORK DAILY:

The announcement of the death of William Hay has cast a dark shadow over our entire community. Until quite recently his early taking off was even beyond the possibility of contemplation. Prior to a recent attack of pneumonia, he was apparently in the enjoyment of such health and spirits as would have insured to the eye of an ordinary observer, a sound and vigorous constitution for many years to come. Mr. Hay was yet a comparatively young man, and it is with inexpressible sadness that we chronicle the untimely death of one who while yet in the zenith and fulness of manhood has fallen at midday before the shadows of the evening of life had commenced to gather around him.

He was esteemed by all who knew him, because of the purity of his life and the conscientious discharge of his duties of good citizenship, and who added to his virtues all that belongs to the character of an upright and able lawyer. There was no tricky smartness about him, or desire to entrap an adversary by deceit and stealth. He relied upon the truth and merits of his case, and was earnest in making that plain to the court. He was laborious and diligent in the preparation of his cases, and he did not spare himself in faithful work for his large and respectable clientage. He and his late partner, Mr. Cochran, were generally engaged in the trial of the most prominent cases, and now both are gone.

Mr. Hay early in life showed a strong predilection for the law. With the aim of becoming a lawyer, he prepared himself for college at the York County Academy, and entered the freshman class at the Pennsylvania College at Gettysburg, Pa., when he graduated in 1856. He then read law with the firm of Evans & Mayer, and immediately after his admission to the bar, in 1858 was invited by the late Hon. Thomas E. Cochran, to become his law partner, which he accepted. This partnership continued until the death of Mr. Cochran about one year ago.

On account of a large legal practice Mr. Hay devoted very little time to politics.—Shortly after his admission to the bar he was nominated on the Republican ticket as District Attorney, and notwithstanding a very large Democratic majority in the county, he came very near being elected. During the Tilden and Hayes presidential campaign, Mr. Hay was appointed a state elector. He was a director of the York National Bank and the York Water Company and also their counsel. Several years ago he received the appointment of resident counsel of the Pennsylvania Railroad Company, a very responsible and lucrative position, which he held until the time of his death. He was also the counsel for many of our large manufacturing establishments.

In social walks, and in his house and family surroundings he was a model. Gentle and courteous to all who approached him, it was a pleasure and happiness to meet him.

His kindly voice and cheerful nature are gone from us forever; but we cannot forget his many exalted virtues, his true and generous manhood, his faithful performance of the duties of his life, and, above all, his consistent Christian example.

A large attendance of the bar was had at the time and place mentioned in the following call for a meeting issued by the senior member of the bar, to wit: "The Judges of the court and members of the bar are requested to assemble at the grand jury room this (Monday) afternoon, at

half past three o'clock, to take action relative to the death of William Hay, Esq.

ROBERT J. FISHER."

YORK, May 14, 1883.

All of the members of the bar now in York—quite a number being at the Supreme Court—able to attend, were present at the meeting.

At the hour named in the call, on motion of Col. Maish, duly seconded, Hon. Robert J. Fisher was elected President, and on motion of James W. Latimer, Esq. George W. Heiges was elected Secretary of the meeting.

The President, on stating the object of the meeting feelingly spoke of the great loss the bar has sustained by the death of Mr. Hay. On motion of James W. Latimer, Esq., a committee of five was appointed to prepare a minute expressive of the sense of the meeting on the event that had brought the court and bar together. Before resuming his seat, and in support of the motion Mr. Latimer paid a warm and just tribute to the abilities and virtues of the deceased. The committee on resolutions appointed in accordance with the above motion was composed of the following gentlemen: James W. Latimer, John Blackford, H. L. Fisher, Levi Maish, Geo. W. McElroy, Esqs.

In due time the committee reported the following resolutions which were adopted:

The Judges of the courts and members of the bar of York county, in bar meeting assembled, have heard with deep and unfeigned sorrow of the death of William Hay, Esq., which occurred yesterday morning, May 13th.

His cultivated mind, ripe scholarship, large professional attainments and unswerving integrity secured for him our respect, and his amiable disposition and unvarying kindness and courtesy commanded our warmest attachment.

Cut off by the hand of death in the meridian of life, in possession of his maturest powers of intellect and professional resource, and at a period when those powers and resources were called into fullest exercise, we deplore in his death the loss of an able and useful co-laborer, and a friend.

To his bereaved widow and relatives we desire to tender our profound sympathy in their grevious affliction, and invoke for them the sustaining care and consolation of the Heavenly Father "who doth not willingly afflict his children."

Be it resolved that we will attend Mr. Hay's funeral in a body and that S. H. Forry, G. W. Heiges, John W. Bittinger and Horace Keesey be appointed pall-bearers on the part on the bar.

Be it further resolved that the foregoing minute be presented to the court at its next meeting and that a copy of the same be sent by the secretary to Mrs. Hay; and also that the proceedings of this meeting be published in the newspapers.

JAMES W. LATIMER,
GEO. W. MCELROY,
H. L. FISHER,
JOHN BLACKFORD,
LEVI MAISH.

Able and touching addresses upon the life, character and noble example of William Hay, their deceased brother of the ancient and honorable profession of the law, were then delivered by his Honor Judge Wickes, George W. McElroy, H. L. Fisher and John W. Bittinger, Esqrs.

On motion the meeting then adjourned to assemble at the late residence of the deceased, for the purpose of attending the funeral.

At a meeting of the Young Men's Christian Association held Monday evening, May 14, 1883, the following preamble and resolutions were adopted:

WHEREAS, It has pleased our Heavenly Father to call from our midst our beloved brother William Hay, Esq., who has been a member of the association for a number of years.

Resolved, That while we bow in humble submission to the will of Almighty God, who doeth all things well, in calling our

brother from a life of usefulness to a life of peace and rest.

Resolved, That we tender our Christian love and sympathy to the bereaved family and commend them to look to that source of comfort which the deceased sought and exemplified in his life.

Resolved, That a copy of the above preamble and resolutions be presented by the committee to the family of the deceased, and also be recorded on the minutes of the association and published in the daily papers.

J. G. EISENHART,
J. F. STRAWINSKI,
J. B. OSWALD.

YORK, PA., May 14, 1883.

For the DAILY.

We have just laid to his last rest another of York's noblest citizens. Easter Sunday was saddened by the death of our dear Mr. Small; and on Whit-Sunday our beloved and gifted friend, William Hay, was cut down in the fullness of his beautiful manhood.

You have well spoken of him as the able lawyer and good citizen. Others have followed with memorials of respect and condolence. It is fitting that I speak of him as the man, the friend and companion,—for a thousand memories of the past crowd around me, all so filled with recollection of him that it is in vain to try to resume my work. I have known William Hay intimately for over twenty-five years, and during all that time never heard him speak an unkind word. He was altogether one of the purest and loveliest characters that ever lived. I have never known him to use an expression his loved mother would have blushed to hear; and his mind was bright as his character.

Three dear friends—Henry Schmidt, D. E. Small and William Hay—three of the most beautiful characters that ever enriched and ennobled any community, have passed from among us, and the sense of loss and loneliness is almost overwhelming. They have forged strong links in the chain which should bind us all to the Better Land. May the Kind Father, whom they all so loved and trusted, comfort the stricken ones left behind; may He ever fill our hearts with kind remembrance of the fatherless and widow in their affliction," and keep us all, like those who have gone before, "unspotted from the world."

A. B. F.

YORK, Tuesday Evening, May 15.

Tuesday afternoon the last sad rites were performed over the earthly remains of the late William Hay. Long before the hour fixed for the funeral bereaved relatives and friends began to assemble, and by the time services commenced the spacious residence of the deceased was filled. A large number of persons from a distance were in attendance. The services were conducted by Rev. Arthur Powell, rector of St. John's P. E. Church, assisted by the venerable Rev Doctor A. H. Lochman and Rev. L. A. Gotwald, D. D.

The flower offerings were rich and elegant, consisting of a harp, lyre, crosses, star, sickle, mound and pillows, and filled the air with their fragrance.

The funeral was one of the largest that has taken place in York for years. The following gentlemen acted as pall bearers. The Hons. P. L. Wickes and John Gibson, Judges of the Court and Messrs. W. Latimer Small, G. E. Hersh, Horace Bonham and George H. Sprigg.

Abstract of Recent Decisions.

(*Cases not otherwise designated are Supreme Court Cases.*)

Criminal law—Delay in prosecuting.—If a prosecution is not withdrawn, it is the duty of the magistrate to send up the recognizance on or before the next meeting of the grand jury. If such recognizance is not sent up for several terms after it is entered into, and no explanation is made for the delay, the prosecution on that information is at an end, and an indictment not based on a fresh information and hearing will be quashed, unless it appears that the course of procedure taken was required by some pressing necessity. *Commonwealth v. Kohle*, (Luzurne Q. S.) 12 Luzurne Legal Register 22.

QUARTER SESSIONS.

Q. S. of Lancaster County.

Adamstown Borough Road.

Roads—Orders to Viewers—When defective.

Where the order to the viewers does not conform to the petition praying to view, change and straighten a road, it is a fatal defect and an exception on that ground will be sustained.

Where an old road is asked to be changed and straightened the petition should also pray that the parts of the old road not required be vacated, in order that the statute forbidding the width of a road to be more than fifty feet be complied with.

Exceptions to report of viewers.

April 14, 1883. PATTERSON, A. L. J.—The exceptions to this report of viewers are thirteen in number. We will not recite them. Some of them, in the opinion of the Court are well taken and must be sustained.

The 12th exception cannot be sustained. The Court of Quarter Sessions has jurisdiction in this case. The road in question is an old public road, laid out many years since and long before the borough of "Adamstown" was incorporated, and the Supreme Court, have held, and as late as 1870, in 16 Smith, p. 61, in the Somerset and Stoystown road, that "the borough law as to streets does not apply to public roads through a borough of which only part is within the borough. Nor is the report invalid because of the viewers not stating who was to pay the damages assessed to 'Squire Billingfelt. (See 6 Norris 336, Road in O'Hara Twp.) Nor because of carrying the road partly over the bed of a road already laid out. (See 2 Rawle 421, West Chester Road, and 9 Harris 217, Hess' Mill Road.)

The petition for this road is peculiar.—After stating that the petitioners "labor under great inconvenience for want of a change in that part of the public road leading from Lancaster to Reading," it asks that proper persons be appointed to "*view. change and straighten* said road;" omitting the petition to vacate any part or portion of the same if found necessary, &c.

If, however, such a petition is in itself admissible in this case, of which we have great doubt, the order issued from the clerk's office to the viewers must be considered as fatal to this proceeding. The order of the court is the authority for the action of the viewers, and in this case it fails to order them to do what the petitioners prays for; it is in law mandatory, but it in no part of it orders them to "*view, change and straighten*" said road. The order directs the viewers "to view the ground proposed for the said road, and if they view the same, and a majority of the viewers agree that there is occasion for such road, they shall proceed to *lay out the same*, &c." The report of viewers is, of course, in conformity with the order, it mentions nothing whatever about change and straightening; hence both the order and the report is foreign to the petition of he inhabitants. But there is a defect existing of a still more damaging character to these proceedings. The report and the depositions, taken and read at the argument, show that the road laid out is partly laid out on the bed of the old road *the whole length* of the new road reported; further, that the new road is run and recommended to be the width of forty feet and the old road was sixty-six feet, as represented by the original town draft.—That would, without the vacation of part of the old road, leave the new road more than the width of fifty feet, which is forbidden by the statute, and it has been ruled by the Supreme Court, in the Bridgewater Road, 4 W. & S 39, that "a public road cannot be located alongside of and adjoining another public road so as to increase the width of both exceeding fifty feet." That ruling would strongly imply that where an old road is asked to be changed and straightened, the petition should also ask the vacation of the parts of the old road not required.

The proceedings in this case are, in our opinion, defective *ab initio*, and must, for that reason, be set aside. The 1st, 2nd, 4th, 5th and 11th exceptions are sustained and the report is now set aside and proceedings quashed.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAY 24. 1883. No. 12

OYER AND TERMINER.

O. T. of Adams Co.

Com. vs. Coyle.

Criminal Law—New Trial—Insanity.

A. was convicted of murder in one county. The Supreme reversed judgment, and granted a venire. The venue was then changed to another county. On the trial there the prisoner asked leave to withdraw his plea of "Not Guilty," and plead to the jurisdiction of the Court. This the Court refused. HELD, not to be sufficient ground for a new trial.

Witness testified that he had known John Coyle, Jr., 17 or 18 years; that he had plowed for John Coyle, Sr.: plowed in the Spring; got ground ready for potatoes and tobacco; that he saw John Coyle, Jr., on these different occasions; saw him always about when the witness was there "Sometimes he cut wood in the wood shed; one time white-washing, making fence; he and the old man followed me when I plowed, and gathered up stones; sometimes ferried river men, sometimes country people, across the river, he spoke to me, of course; sometimes he'd ask me if I had my corn planted; if I had all my grain in, (I often went back and forward,) asked me if I was done husking corn. * * * I have seen him riding horseback alone up the road sometimes. This Spring 3 years Johnny came and said the old man sent up to see if you would plow for us." HELD, to show sufficient acquaintance with the prisoner to be permitted to express his opinion as to his soundness of mind.

It was not error to permit the District Attorney to ask the medical witnesses as to each separate item of alleged evidence of insanity and then group the whole into one question.

It was not error to permit the District Attorney in his argument to the jury, to read portions of the Pentateuch relating to murder.

Motion for a new trial.

The charge of the Court below (WICKES, A. L. J.) and his opinion on the motion for a new trial are given in Com. *v.* Coyle, 2 YORK LEGAL RECORD 199.

The opinion of the Supreme Court, reversing the judgment, will be found in Coyle *v.* Commonwealth, 3 YORK LEGAL RECORD 133. A motion was then made for a change of venue, which was granted by WICKES, P. J. (see Com. *v.* Coyle, 3 YORK LEGAL RECORD 171.

The case was tried in Adams County, and resulted in a verdict of guilty. This motion was then made for a new trial.

H. L. Fisher and W. C. Chapman, for motion.

S. McSwope and E. D. Ziegler, for for Commonwealth.

May 11, 1883. MCCLEAN, P. J. Upon the filing of this motion and reasons therefor on Monday, May 7, 1883, by Mr. Fisher, counsel for the prisoner, a continuance of the argument was asked for and granted, the Court being influenced largely in granting the continuance by the fact of Mr. Fisher's hoarseness, which would have made it uncomfortable for him to proceed with the argument at that time. He suggesting the last of this week, at the time for further argument, this day, Friday, the 11th day of May, at eleven A. M., was fixed for the purpose. A letter was written by Mr. Fisher to me, dated York, May 8, in which he refers to the sickness of his colleague, Mr. Chapman; the cases of Mr. Chapman for the Supreme Court; a Court of Common Pleas on the 21st, at which both of them had important cases, concluding "all things considered, it seems impossible for us to, be present and argue the motion before say the 30th inst. I exceedingly regret this, but see no help for it."

After inquiring of the District Attorney his disposition as to a further continuance, I immediately replied to Mr. Fisher that all other professional engagements of himself and Mr. Chapman I must deem subordinate to what remains to be done in this case, and informing him that I thought that he, Mr. Fisher, should be present today, and that I could not agree to delay.

I received a second letter from Mr. Fisher, dated York, May 9th, in which he states: "If the commonwealth's officer will persist in his refusal, we shall of course be compelled to let the matter go by default and take our writ of error."

I considered it the duty of Mr. Fisher to be in court to-day and argue his motion, if he had any good cause to show for a new trial, and the sickness of Mr. Chapman was no sufficient reason for Mr. Fisher's failing to appear.

The reasons filed have been carefully considered by the Court:

I. It is respectfully submitted that the learned Court erred in refusing to allow the prisoner to withdraw the plea of Not Guilty, so as to enable him to plead to the jurisdiction of the Court, before being called upon to plead to the indictment.

The first is not sufficient in law. The prisoner had been arranged in York; the plea of not guilty was there entered, and there he was tried. The record was accordingly made up and sent with the prisoner to this county upon a change of venue. The action of the Court upon the plea to the jurisdiction was simply in effect to overrule it.

II. The jurors impaneled and sworn in the case, and having the prisoner in charge were allowed to separate repeated-

ly between the time they were so sworn and impaneled and the rendition of the verdict.

III. Oliver F. Neely, who was sworn and impaneled as one of the said jurors, was not a competent juror, his name having been unlawfully in the jury wheel at the time he was drawn; all of which was unknown to the prisoner or his counsel, or either of them, until after the rendition of the verdict.

The second and third reasons were of an inquisitive character, containing no specifications in support of them, nor were they accompanied with any offer of evidence to sustain them.

The records show that the name of Oliver F. Neely was not in the jury wheel for the year 1882, and that had not served previously in 1883 as a juror.

IV. It is respectfully submitted that the learned Court erred in overruling the prisoner's objection to the opinions of Michael Beckel, and other witnesses against the prisoner, on the question of his soundness or unsoundness of mind.

An examination of the testimony of Michael Beckel shows that he had known John Coyle, Jr., 17 or 18 years; that he had plowed for John Coyle, Sr.; plowed in the Spring; got ground ready for potatoes and tobacco; that he saw John Coyle, Jr., on these different occasions; saw him always about when the witness was there "Sometimes he cut wood in the wood shed; one time white-washing, making fence; he sometimes and the old man followed me when I plowed, and gathered up stones; sometimes ferried river men, sometimes country people, across the river; he spoke to me, of course; sometimes he'd ask me if I had my corn planted; if I had all my grain in, (I often went back and forward,) asked me if I was done husking corn. * * * I have seen him riding horseback alone up the road sometimes. This Spring 3 years Johnny came and said the old man sent up to see if you would plow for us." The witness, although an illiterate man, testifies to the actions and words of John Coyle Jr., which indicate soundness, and having testified to facts within his knowledge, during a long acquaintance and whilst living near the party, he could be permitted to express the opinion which he did, that the party was of sound mind.

V. Also, in allowing the District Attorney to separate into many small, and apparently immaterial parts, the entire chain of strong, affirmative evidence given of the prisoners unsoundness of mind, and asking the medical witnesses for the Commonwealth (in rebuttal,) on each isolated part of the prisoner's defence, the question, "would that show insanity?" instead of fairly embracing all the material facts, or a group of them, in one question.

I can see no error in the District Attorney asking the medical witnesses as to the separate cause of insanity, as alleged in behalf of the prisoner, and then subsequently grouping them in one questin, as he did.

Indeed, Mr. Fisher frankly stated to the Court that his principal reasons were the last four, namely: the VI, VII, VIII and IX.

VI. The verdict is against the law and and evidence.

The verdict was not against the law and the evidence.

VII. It is against the weight of the evidence:—the affirmative evidence adduced on behalf of the prisoner's insanity alone "fairly preponderated" over the mere negative evidence by which it was attempted to rebut it, and taken in connection with that of several witnesses called by the Commonwealth, to wit: Mary Ann Coyle, Dr. J. O. C. O'Neal, and others, it proved the prisoner's insanity at the time of the homicide beyond reasonable doubt.

Nor was the verdict against the weight of the evidence. The evidence of the prisoner's sanity was overbearing.

VIII. Mr. S. McSwope, District Attorney of Adams county, during the summing up to the jury of the evidence in the cause, persisted, in the face of objections made by the prisoner, by his counsel, in reading to the jury as "good law" in the case lengthy portions of the Scriptures from the XX and XXI chapters of Exodus, &c., such as: "He that smiteth a man so that he die shall be surely put to death;" "Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."—"He that sheddeth man's blood, by man shall his blood be shed," and much more of the same sort.

Contrary to the better practice, the prisoner's counsel were allowed the largest license in reading scientific and legal books to the jury as part of their argument, and there can certainly be no valid

objection to the reading by the District Attorney in his summing up to the jury from portions of the Pentateuch.

Murder is expressly forbidden by the divine; and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime.

Upon these two foundations, the law of nature and the law of revelation, depend all human law; that is to say, no human law should be suffered to contradict these. —1 Blackstone's Commentaries, 42.

The time will never come when the Book of Books shall be excluded from our courts.

IX. It is a constitutional right, of which the accused cannot be lawfully deprived, and which cannot be waived, to be met by his accusers face to face. Of this right John Coyle, Jr., the accused in this case, was deprived by the Commonwealth, in that its prosecuting officer neglected or refused to bring Mrs. Annie Goodyear, *nee* Myers, who, by the records in the cause, appears to be the prosecutrix and accuser of the prisoner in this cause, face to face with them, by calling her to the witness stand, and allowing her to be interrogated on oath or affirmation touching the matter of the said accusation.

This reason is framed in misapprehension of the facts. Mrs. Annie Goodyear, *nee* Myers, does not by the records in the cause appear at all in the list of witnesses endorsed upon the indictment, neither did she make the original or any information.

No reason has been presented, or exists in my opinion, for the arrest of judgment or for a new trial. Motion overruled.

SUPREME COURT.

Madlem's Appeal.

Where there are two judges in a Court, and a decree is made by one which is dissented to by the other, the Court being thus equally divided no valid order or decree can be made.

When no proper decree can be made by reason of the failure of the judges to agree, they have the power to call upon a judge from another district to hear and decide the case.

Cahill v. Benn, 6 Binney 99, distinguished.

Appeal from the decree of the Court of Common Pleas of Lancaster county, sitting in equity.

H. M. North, *E. K. Martin* and *T. B. Holahan*, *Esqs.*, for appellants.

S. H. Reynolds and *Wm. S. Amweg*, *Esqs.*, for appellees.

This was a bill in equity filed in the Court below by the appellees, the facts of which are as follows:

The society of Seventh-day Baptists of Ephrata, in Lancaster county, was incorporated by Act of Assembly approved the 21st day of February, 1814. This Act provided, *inter alia*, for the election of seven trustees, who were "to be elected on the first Monday of January in every fourth year after the passage of the Act, at the town of Ephrata, in the county of Lancaster." An Act of Assembly was passed on the 10th day of February, 1865, reducing the number of trustees from seven to three. The sixth day of January 1879, being the regular and appointed time for holding the quadrennial election, notice was posted on the "Saal," or meeting house, that on that day between the hours of 12 m. and 4 o'clock, p. m., an election would be held for trustees of the Seventh-day Baptists. Some of the members, dissatisfied with the management of the society, resolved on the election of a new board of trustees, and, as a result, two sets of trustees, of three each, were returned as elected.

On the 18th of January, 1879, both sets, claiming to have been legally elected, presented to the Orphans' Court, as required by the charter, the election returns with certificates attached, together with their bonds prepared asking for the approval of the same. The Court, after testimony taken and read, declined to approve either of the bonds, Judge PATTERSON delivering the opinion, but suggested that an election be held to elect trustees "to fill the vacancy that exists in the board of trustees and which has occurred through 'inability to serve.'" Whereupon notice was posted for an election to be held on the 7th day of July, 1879, when William Madlem, Lorenz Nolde and Jacob S. Spangler were returned as elected.

The newly elected trustees filed their bond with sureties and asked the Court to approved the same. Testimony was taken and read on the argument after which Judge PATTERSON delivered an opinion approving the bond. Judge Liv-

INGSTON dissented and objected to the approval of the bond.

The new board of trustees, not getting control of the property, filed a bill in equity praying that the defendants be enjoined and restrained from taking part in any way in the management of the property, &c., of the society. A master was appointed to take testimony and report, whereupon he dismissed the bill of complaint. The Court, upon exceptions to the master's report, sustained the exceptions and made the injunction perpetual. Judge PATTERSON delivered the opinion, Judge LIVINGSTON dissenting.

An appeal was taken from this decree to the Supreme Court, assigning as error, in addition to setting aside the master's report dismissing plaintiff's bill, and the entering of the above decree, the following:

3. "It was error in Judge PATTERSON to enter a decree against the defendants, the President Judge being present and dissenting."

4. "The two judges of the Court being present on the bench, and not agreeing to sustain the plaintiff's bill, it was not competent for one of them to enter a decree against the defendants, the bill, by the dissent of one of the judges fell, and should have been dismissed."*

Opinion by PAXSON, J. Filed June 4th, 1883.

The decree in this case was entered in the Court below by the Additional Law Judge, the President Judge being present and dissenting. The Court was therefore equally divided, and the rule in such cases is that no valid order or decree can be made. If there is a motion before the Court it falls. This is the rule everywhere, and it requires no argument to vindicate it. Equal divisions sometimes occur in this Court owing to the absence of one of its members. The only order we can make in such a case is to affirm the judgment or decree of the Court below. The plaintiff in error or appellant, who is the actor, fails and his motion to reverse falls to the ground. An affirmance here by a dividend Court means merely that the judgment or decree below cannot be disturbed.

In order to reach his conclusion, the learned judge who entered the decree below, reversed the master and set aside his findings of fact. His decree included an order for a perpetual injunction and the disposition of the costs.

To all this the President Judge, who possess at least equal power, dissented. He had an equal right to enter a decree embodying his own views of the case. We would then have had the unusual case of conflicting orders issued out of the same Court. To state such a proposition as this is to answer it.

The learned judge (A.L.J.) below was evidently misled by the case of Cahill *v.* Benn, 6 Binney 99. It does not sustain his position. In that case there had been a trial at law and a verdict for the plaintiff The defendant moved for a new trial, and upon this motion the Court were equally divided. The motion necessarily fell. Afterwards the plaintiff's counsel moved for judgment, and two judges being present, one ordered judgment as a matter of course, and the other objected to the entry.

The prothonotary entered judgment and upon a writ of error the judgment was sustained by this Court. It is manifest that the plaintiff was entitled as of course to judgment upon the verdict after the motion for a new trial failed, and it would have been wrong to have denied it. This was the view taken by TILGHMAN, C. J., who delivered the opinion of the Court, in which he said: "We cannot suppose that Judge CAMPBELL meant to act with such impropriety as to arrest the regular course of law by forbidding the prothonotary to make a proper entry. We rather think that he wished his opinion against the verdict to be entered upon the record, and to leave the rest to the law; any other proceeding would have been highly improper, and we will not without necessity suppose that Judge CAMPBELL intended to do what was wrong.

The distinction between entering a judgment *pro forma* upon a verdict, to which the party was entitled as of course, and granting a decree in equity is so palpable that we need not further discuss the case. The decree below was improvidently and unlawfully entered and must be set aside.

This leaves the case precisely as if no decree had been made. If the learned judges below cannot agree upon a proper decree, they have the power to call upon a judge from another district to decide the case for them. But until we have a lawful decree we cannot reach the merits.

The decree is reversed at the costs of the appellees.

*See Seventh Day Baptists, 4 YORK LEGAL RECORD 29 for the opinion of the Court below on a contest subsequent to the decree from which this appeal was taken.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, MAY 31, 1883. No. 13

QUARTER SESSIONS.

Q. S. of Delaware County.

Commonwealth ex rel. Boden v. McGolrick.

Forcible Entry—Under what circumstances one cannot forcibly enter his own dwelling.

Where the marriage relation is disrupted, or denied by one of the parties, who is in possession of the premises, a forcible entry by the one out of possession is unlawful.

This was a habeas corpus, brought by the relator, Michael F. Boden, to secure his release from the custody of his bail, John McGolrick.

The facts in the case are fully stated in the opinion of the court:

May 7, 1883. CLAYTON, P. J. The relator is in the custody of his bail, charged with a forcible entry into the dwelling of his alleged wife who is the prosecutrix.—She alleges that, supposing the relator to be unmarried, she wedded him and has lived and cohabited with him for several years as his wife; that she has recently discovered that she was deceived and that he had another wife living when the marriage was contracted between him and her; and that this discovery has caused a rupture of their former relations and a separation from each other's society as husband and wife. That he had withdrawn from her bed and had not slept in the part of the house occupied by her since Easter Sunday last. That she was left in peaceful possession of the dwelling part of the house leased by him as a hotel and dwelling. That since the separation he has admitted his former marriage and has publicly renounced the prosecutrix as his wife.

The evidence sustains the allegations of the prosecutrix and also shows that after the discovery by the prosecutrix of his former marriage, and after her withdrawal from his society, he sold the lease, good will, furniture and fixtures of the establishment to John McGolrick, and for the purpose of delivering to him the possession he violently and forcibly broke into and entered the premises, peaceably occupied by the prosecutrix and her children. The evidence shows that a mob of about one hundred and fifty persons were present at the time, apparently assembled to witness the breaking into the house. He has been arrested for forcible entry, and now asks to be discharged because he is the lessee of the premises, and is the licensee of the hotel kept there, and the husband of the prosecutrix. There can be but little doubt that resistance upon the part of the prosecutrix would have resulted in a breach of the peace, and as the preservation of the public peace is of more importance than any mere private right, it is doubtful if the relator could, under the circumstances, forcibly enter his own house. If the prosecutrix were his wife, his right would seem to be clear to forcibly enter the house, but this is denied, and the evidence is sufficient to raise a serious doubt upon this vital point in the case.—If she is not his lawful wife and is the innocent victim of his deception, to have longer cohabited with him would have been fornication on her part. She was, therefore, morally as well as legally right in resisting his further control over her person, and had the right to forcibly exclude his further control over her or her children. If she was left by him in the peaceful possession of the premises he could not after the discovery of his deception and crime, by force and violence thrust her and her children into the public street. She had a right to dwell where he had placed her until ejected by some higher authority than his. If he desired to reclaim his household goods, replevin was his proper remedy. If he desired to dispossess her of his land, ejectment was his lawful action.

It may be admitted that a man can lawfully break into his own dwelling when it is forcibly detained from him by his

wife, children or servant. 1 Rus. Cr. 306; Bac. Tit. F. E. (D.) Ros. Cr. Ev. 378, and Commonwealth *v.* Keeper of Prison, 1 Ash. 140. But where the marriage relation has been disrupted, or where it is denied by the one in possession, neither the alleged husband or wife can forcibly and with such violence as will probably cause a breach of the peace enter the premises in the adverse possession of the other. This was decided by Lord C. J. Tenterden in Rex. *v.* Smith, 5 C. & P. 201, and is undoubtedly the law. In that case the wife living separate from her husband rented a house in her own name. The husband with the consent of the landlord entered and was in possession when the wife with two others broke into the house. It was held she could be convicted and the case was sent to the jury. If the prosecutrix in the present case is not the lawful wife of the relator and is the innocent victim of his deception, she had the lawful right when she discovered her unfortunate condition to forcibly exclude him from further control over her person. A continuance of their relations would have been a crime upon her part and his attempt to forcibly enter her dwelling after she had peaceably possessed herself of it was unlawful.

The relator is therefore remanded.

COMMON PLEAS.

C. P. of Luzurne County

Houpt, Garnishee v. Lewis.

Justice of the Peace—Attachment execution.

Where a garnishee in his answer denies any indebtedness to the defendant as an individual or principal, but admits that he has had dealings with him as agent, the answer will prevent judgment against the garnishee.

When the answer denies indebtedness to the defendant as a principal a claim by the defendant to have the fund set apart to him under the exemption law will not conclude the garnishee, nor alone warrant the entering of judgment against him.

It is competent for the plaintiff; notwithstanding the answers of the garnishee, to require the issue to be tried before the justice; and if the record shows a trial, the court cannot, on certiorari, review the correctness of the justice's conclusions from the evidence.

It is possible, also, that upon the day of the hearing the plaintiff might cause additional interrogatories to be served upon the garnishee, and require him to answer them.

The verbal statements of the garnishee, made in the presence of the justice, after his answers have been delivered, and when not under oath, and which are not irreconcilable with his former answers, will not authorize the justice to disregard his former answers, and to enter judgment against him.

Practice before justice of the peace in cases of attachment execution, considered.

Certiorari.

June 11, 1883. RICE, P. J. On December 6th, 1882, the alderman issued an attachment execution against H. C. Gates, as defendant, and M. B. Houpt. On the same day the plaintiff filed interrogatories. The writ and a copy of the interrogatories and a rule to answer were duly served.—On December 14th, 1882, the return day of the writ and the rule, all parties appeared before the alderman. The defendant in the writ put in a written claim for the benefit of the exemption law. The garnishee filed written answers to the interrogatories, as follows: "I have not had transactions with him" (the defendant) as an individual or principal since the within attachment was served on me, nor was I then indebted to him as such, nor have I since been. Prior to the service of said attachment I had been dealing with said Gates as agent, and at the time of the service thereof I had ordered the manufacture of certain goods by him as such. Since, and prior to the service thereof, he has delivered said goods to me as such agent, amounting to $595.18, and I have paid him on account thereof, to wit, December 13th, 1882, the sum of $250." The interrogatory to which this answer was made reads as follows:—"Have you had any business transactions with the said H. C. Gates by which you are indebted to him? If yes, state the amount of your indebtedness to him at the time of the service of this attachment.—State in your answers the particulars in relation to your indebtedness to him, and whether on account, note, or otherwise."

A garnishee is only required to answer the interrogatories that may be submitted to him. "And judgment will not be entered against him on his answer, unless he expressly or impliedly admits his indebt-

edness to, or his possession of assets belonging to, the judgment debtor: and the admission ought to be of such a character as to leave no doubt in regard to its nature and extent;" 9 Sm. 361-364.

Although the facts of the case cited differ from those involved in this case, the principle controlling the decision is a general one, and is applicable here. The general denial by the garnishee of any indebtedness to the defendant, and of any transactions with him as an individual or a principal, was a complete answer to the interrogatory, and relieved him from the necessity of explaining his transactions with him as an agent. The garnishee asserts in his answer, not merely that the defendant in his transactions with him claimed to act as an agent, but that he was, in fact, such; and, therefore, if the answer was in itself sufficient to prevent judgment against the garnishee, no act of the defendant subsequent to the service of of the writ, as, for example, claiming the benefit of the exemption law, could destroy its effect. We do not wish to be understood as saying that evidence of such an act would not be competent for any purpose, or in any stage of the proceedings. It might be evidence to discredit the defendant, or to estop him from denying that the fund was his. But what we mean to decide is this, that when the garnishee denies in his answer any indebtedness to the defendant, and the record shows nothing further than a claim by the defendant to have the fund set apart to him under the exemption law, judgment cannot be entered against the garnishee on his answer.

The record further shows that the hearing was continued until December 16th, 1882, at which time the parties again appeared before the magistrate. On the last mentioned date the plaintiff filed a paper excepting to the answer of the garnishee, and concluding with a request "that the garnishee may be further examined and required to make further answers, and that the matter may be fully inquired into and tried before the alderman." The garnishee declined to file any further answers in writing to the interrogatories already answered, "but answered verbally" (as the transcript states) "that nothing was said about defendant being agent at the time he contracted the debt with defendant, and that the reason he paid a part of the claim was that he supposed it would make no difference, as he still had money enough in his hands to pay plaintiff's claim. The record thus concludes: "The alderman being of the opinion that the claim of the defendant is virtually an admission that the debt is owing to him personally, and not to him as agent, and the defendant and garnishee both failing to disclose whom defendant is agent for, and also failing to give the particulars of the transaction, therefore judgment is publicly entered that the plaintiff have execution," etc.

In thus entering against the garnishee we think the alderman erred. It was competent for the plaintiff, notwithstanding the answers of the garnishee, to require the issue to be tried, and to introduce evidence to show that the money attached was a debt due to the defendant as an individual or principal, and if after hearing such evidence the alderman had entered judgment for the plaintiff, the court could not, on *certiorari*, review the correctness of his conclusions from such evidence.—The only remedy of the party aggrieved would be by appeal. So, also, upon the trial of the issue, the plaintiff could have required the defendant and the garnishee to be sworn, and to testify as if under cross-examination. It is possible, also, that upon the day of the hearing the plaintiff might have caused additional written interrogatories to be served upon the garnishee, and have required him, by rule, to answer them within the time fixed by the statute. But the record, by which alone we must decide as to the regularity of this judgment, does not show that either

of these methods was followed, and hence we conclude; first, that the admission of the defendant, implied from his claim of the exemption, could not conclude, nor alone warrant judgment against the garnishee; second, that such judgment was not warranted by the failure of the garnishee to state specifically for whom the defendant was agent, the interrogatories, as served upon him, not requiring such answer; third, that his verbal statement, made after his answers had been delivered to the magistrate, and when not under oath, and which were not in themselves irreconcilable with his former answers, did not authorize the alderman to disregard his former answers, and to enter judgment against him. The judgment is reversed.

C. P. of Chester County

King v. King and Miller.

In the absence of actual notice of a judgment; the defective entry on the records by the introduction of an initial letter is not recorded notice, and a judgment thus defectively entered will be postponed to a judgment properly entered.

B. held a judgment, entered against J. T. M. in 1871; K recovered a judgment against J. M. in 1872, both in fact, against the same defendant. The defendant's name was J. M. He took his title in this name, and so signed all legal papers, excepting the bond to B. K. had no knowledge of B's judgment. In a distribution of the fund produced by the sale of the real estate of J. M., HELD, that the judgment of K. is entitled to the proceeds to the exclusion of that of K.

PER BUTLER, P. J.—Had K. been aware of the judgment by B. he would have been postponed.

Exceptions to the report of the auditor to distribute money in court produced upon a sale under Vend. Ex. No. 64 to Aug. T. 1872, against Jesse King and John Miller.

The fund in court for distribution amounted to $1,968.82. After an appropriation of a part of the fund to prior lien creditors, the balance was claimed on the following judgments: Wm. Buckwalter *v.* John T. Miller, of Springville, entered August 14, 1871, for $300; and Albert F. King *v.* John Miller, by default, obtained Jan. 30, 1872, for $205.60, the latter being the judgment through which the sale was made.

On behalf of King, it was contended that the fund was produced on a sale of real estate as the property of John Miller, and that a creditor whose judgment was entered against John T. Miller had no standing in the distribution without showing that both judgments were in fact entered against the same party, which would amount to a parol variation of the record.

Testimony was offered on behalf of Buckwalter, under objection by King, to show that John T. Miller is the same party whose land was sold under the execution from which this fund is produced.—The auditor found the facts as follows: "There are a number of John Millers in the neighborhood of the defendant. For the purpose of preventing his mail matter from falling into the hands of another John Miller, he assumed the name of John T. Miller. There was no other John T. Miller in the neighborhood. Generally, in signing his name to obligations, he signed 'John Miller.' In the case of the judgment bond of Buckwalter, he signed or inserted the 'T' immediately after he had signed 'John Miller,' and before the delivery of the bond, because in the body of the bond it was written 'John T Miller.' His name on the books of several business men in Springville, was John T. Miller, and he appears to have been known in in the village by the latter name. The property is assessed to John T. Miller.—The records show the deed for the property to be to John Miller. All the various suits upon notes, &c., show his signature as John Miller, except in the judgment bond to Buckwalter. That bond is entered against John T. Miller, of Springville. The property was sold as the property of John Miller.

The auditor awarded the balance of the fund to the judgment of Albert T. King.

Exceptions thereto were filed by Buckwalter.

A. P. Reid, for exceptions.

Testimony is admissible to show who are entitled to the fund, and to identify

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JUNE 7, 1883. No. 14.

Miller as the party against whom the judgment was given:

Wood v. Reynolds, 7 W. & S. 406.
Ridgeway, Budd & Co.'s Appeal, 3 Har. 177.
Jones' Estate, 3 Cas. 336.
The York Bank's Appeal. 12 Cas. 458.

Wm. B. Waddell, contra.

Creditors are entitled to rely on the record, and parol evidence cannot be introduced to make such an amendment of the record as would prejudice a creditor who has relied thereon. A judgment entered against John *T.* Miller is no notice to the creditor of John Miller:

Zimmerman v. Briggans. 5 Watts 186.
Crutcher v. Com., 6 Wh. 340.

July 3, 1873. BUTLER, P. J.—The name of the defendant was John Miller.—He took the title to his real estate in this name, and so signed himself to all legal papers, saving the bond to Mr. Buckwalter. To avoid miscarriage of his mail matter he added a "T" to his name, and was known generally in his neighborhood as John T. Miller. He had no authority to make this addition, and it did not change his name. Had Mr. King been aware of the judgment held by Mr. Buckwalter, he would have been postponed. But at the important moment when called upon to act with a view to save himself, he knew nothing of it. He was guided by the record, and it did not exhibit this judgment. He had no knowledge even of Mr. Miller's use of a middle letter; but had he known all the circumstances connected with this, it would not have put him on his guard; because, as we have seen, Mr. Miller excluded the letter in the execution of legal papers. He added it to Mr. Buckwalter's bond after signing, simply because the scrivener had so designed it.

Jones' Estate, 3 Cas. 336, relied upon by the exceptor, bears very little resemblance to this case. There the name was not changed; it was the defendant's proper name, the first part of it expressed by the initial. As the court said "he had a perfect right thus to contract his Christian name;" and as no one was mislead by his so doing, the judgment was well docketed.—Much more like the case in hand is Wood *v.* Reynolds, 7 W. & S. 406, where a judgment was postponed because the defendant's name was changed by the omission of the middle letter.

For these reasons the exceptions are dismissed, and the distribution reported by the auditor, confirmed.

SUPREME COURT.

Sprenkle's Appeal, No. 2.

Administrators—Joint Account—Joint Liability.

G. S. and S. G. jointly administered upon the estate of J. G., and under proceedings in partition sold the real estate upon which a charge had been created, which operated as a lien in the title, and which could not be discharged by an Orphan's Court sale. The purchasers, however, paid the amount charged upon the land to the administrators who filed a joint account. in which they took credit for the sum of money so received, and for the unexpended interest on the lien, due from the intestate. The interest passed into the hands of G. S., the principal into the hand of S. G.—C. S. for whose benefit the charge had been created, was living at that time, and continued to live until 1861, five years after the filing of the account. In 1857, G. S. died, S. G. continued to administer the estate, and was the custodian of the principal sum received by him. He subsequently became insolvent, and died, without having paid over said principal to the heirs of C. S., who were entitled to it upon her death. When the account of the administrators d.b.n.c.t.a. of G. S. was filed, and before the Auditor appointed to distribute the balance thereon, the principal sum was claimed by the heirs aforesaid. HELD, (affirming the Court below) That the estate of G. S. was liable for the said amount retained by S. G.

A second appeal by three of the parties in interest, after the failure of the first, is practically a motion for a re-argument.

Appeal from the Decree of the Orphans' Court of York County; and Motion for re-argument.

The facts in this case are given in Sprenkle's Appeal, 3 YORK LEGAL RECORD 67. The grounds for the re-argument were that owing to the illness of one of the counsel the paper book was hurriedly prepared, and the case not clearly stated; that some of the parties in interest had been unable to join in the first appeal and that the decision of the Supreme Court in another case (and which was unpublished at the time of preparing the first paper book) ruled this case.

James Kell and Wm. Hay for Appellant.

In addition to the authorities cited in the first paper book the following were referred to;

The filing of a joint account is an admission of joint liability, but it by no means follows that such liability is a continuing obligation:

Young's Appeal, 39 Legal Intellingencer 238.

Where an administrator dies before the act of misappropriation by his co-administrator, his estate will not be held liable:

Williams on Exec. 1160.
Perry on Trusts 421.

Nor will he be held any further than he is shown to have participated in the act of misappropriation:

McNair's Appeal, 4 Rawle 157.
Sterret's Appeal, 2 Penna. R. 419.

The Orphan's Court could not discharge the lien of the fund charged on the land:

Dewalts's Appeal, 8 Harris 239.

The appellees were guilty of *laches:*

Hassler v. Bitting, 4 Wright 68.
Calhan's Appeal, 3 Wright 225.

E. W. Spangler and V. K. Keesey for appellees.

Young's Appeal had been decided but four weeks before the first argument of this case. It is fair to presume that the Supreme Court had not forgotten the principle there decided.

The appellees claim as creditors, not as legatees, and there are many cases where accountants would be discharged as against the latter, though not as against the former:

McNair's Appeal, 4 Rawle 148.

Appellees then repeat the authorities given on the first argument.

May 23, 1883. PER CURIAM.—The alleged errors in this decree were fully argued, and the correctness of the decree affirmed when the case was here last year. That appeal was by two of the heirs. This appeal is by the remaining three. It is therefore now practically a re-argument. A review of the opinion of the learned judge, on which we then affirmed the decree, has failed to detect any error therein sufficient to induce us to change our conclusion.

Decree affirmed and appeal dismissed at the costs of the appellants.

Wagner v. Kline.

Affidavit of defence—Promissory note.

An affidavit of defence alleged that the promissory note on which suit was brought had been obtained from the defendant under misrepresentation, and that the consideration had failed; that the plaintiff was present in a conversation between defendant's attorney and the holder of the note, when the attorney said to the holder that the note was a fraud and would not be paid; and that the original payee of the note was a person engaged in dishonest practices, and whose character should have been sufficient to put the plaintiff on his guard. HELD, to be sufficient to send the case to the jury.

Error to the court of Common Pleas of York County.

The action in the Court below was on a promissory note which matured on the 22nd of April, 1882. On the 13th of April, 1882, the plaintiff in error purchased said note from Granville Hartman, paying him therefor the sum of $495.—The note being unpaid at maturity was duly protested for non-payment, and remaining unpaid after protest, this action was instituted for the recovery of the money. The note was for $500, payable with interest six months after date. The plaintiff filed his declaration in the action, together with a copy of note and protest The defendant, within the time prescribed by law, filed his affidavit of defence.—The plaintiff entered a rule for judgment for want of a sufficient affidavit of defence and the Court below, after argument, filed its opinion refusing to enter judgment in favor of the plaintiff. The opinion of the Court below was filed on the 16th of October, 1882, (see 3 YORK LEGAL RECORD 150,) and to the decision of the Court therein expressed, the plaintiff excepted.

Blackford and Stewart for plaintiff in error.

Nothing, says this Court, but clear evidence of knowledge or notice, fraud or *mala fides*, can impeach the *prima facie* title of a holder of negotiable paper taken before maturity;

Morehead v. Gilmore, 27 Smi. 118-24.
Phelan v. Moses, 17 Smi. 59.
Battles v. Laudenslager, 3 Norris 446.

Nor is the rule less stringent although the holder may have taken the note under

circumstances which ought to excite the suspicions of a prudent man:

Phelan v. Moss, supra.
Heist et al. v. Hart, 23 Smi. 286.

This Court has also said, that when fraud is set up as a defence the affidavit must show in what it consisted:

Sterling v. The Mercantile, &c., Insurance Company, 8 Casey 75.
Matthews v. Long, 3 W. N. C. 512.

A general allegation of fraud is insufficient:

Matthews v. Long, supra.
Stett v. Garrett, 3 Whar. 281.

An affidavit of defence which fails to set forth such a state of facts as warrants the legal inference of a full defence to the plaintiff's cause of action is insufficient to prevent judgment for the plaintiff:

Bryan v. Harrison, 1 Wr. 233.
Blackburn v. Ormsby, 5 Wr. 97.
Anspach v. Bast, 2 Smi. 356.
Bright v. Hewitt, 2 W. N. C. 626.

Nothing should be left for inference:

Peck et al. v. Jones, 20 Smi. 83.
Dewey v. Dupuy, 2 W. & S. 553.
Marsh v. Marshall, 2 Smi. 396.

In the case before this Court, the affidavit of defence we submit, discloses no such state of facts as would warrant the Court below in submitting the case to a jury:

Heist et al. v. Hart, 23 Smi. supra.
Reeser v. Wambaugh, 2 W. N. C. 145.
Lingg & Bro. v. Blummer, 7 Norris 518.

H. H. McClune for defendant in error.

A mere general notice that there was some defence, and that the note would not be paid was enough to put Wagner on inquiry:

Hiest v. Hart, 23 Smith, 286.

Filed May 25, 1883. PER CURIAM. We think the facts averred in the affidavit, if unexplained, sufficient to send the case to the jury. This justifies the Court in refusing judgment for want of a sufficient affidavit of defence. The jury is the proper tribunal to pass on the alleged facts.

Writ of error dismissed at the costs of the plaintiff, without prejudice to his right to trial by jury, and a second writ of error after final judgment.

Thompson v. Ward.

A devise to testator's son and son's wife for life, with "remainder in fee simple to his heirs at law in case he should have issue, but in case he should die without issue, then the said tract of land to revert to the heirs at law of my three daughters, A, B and C, in fee simple," gives only a joint life estate to the son and his wife. The failure of issue meant is not an indefinite failure of issue, and the rule in Shelly's Case does not apply. As soon as the son has a child, the remainder in fee vests in that child, opening to let in afterborn children. When once vested in such children the fee is absolute.

Error to Court of Common Pleas of Washington county.

Case stated in the court below by Ward et ux. against Thompson et al. in covenant, on contract to purchase realty.

The premises in question were devised to Ward et ux. by the will of D. Ward, viz:

"Item.—I give devise and bequeath to my son, Henry Ward, and his wife, that portion of the farm known as the Mowl farm, which lies, &c., &c., to have and to hold the same during the term of their natural lives: remainder in fee simple to his heirs at law in case he should have issue, but in case he should die without issue, then the said tract of land to revert to the heirs at law of my three daughters, Catharine, Susannah and Virginia, in fee simple."

Thompson et al. contracted to purchase the same, and the question below was, whether, under this limitation, the plaintiffs could convey a title in fee simple.—The court below held that they could, and entered judgment for the plaintiffs for the purchase money.

December 30th, 1882. SHARSWOOD, C. J. It is undoubtedly one of the best settled rules of construction that when land is devised to a man for life with remainder over on his death without issue, such dying without issue means an indefinite failure of issue unless there is something in the will which shows the intention to have been a definite failure as at the death of the life tenant. In case of an indefinite failure the rule in Shelly's Case enlarged the estate for life to an estate-tail. But we do not think that this rule has any application to the case before us. It falls within the principle of Luddington *v.* Kene, Raym. 203, and the train of decisions which follow in the wake of that case. There Sir Michael Armyn, being seized in fee of the manor to Evers Armyn for life without impeachment of waste; and in case that he should have any issue male, then to such issue male and his heirs, and if he should die without issue male, then to Sir Thomas Barnardistor and his heirs forever. It was held that Evers Armyn took only an estate of life. Now,

the language of Daniel Ward's will means that Henry Ward and his wife should have a joint estate during their natural life; remainder to his children in fee if he should have any; but if he should die without issue, then remainder in fee to his three daughters. As soon as Henry should have a child, the remainder in fee would vest in that child, subject to open and let in other children, if any should afterwards be born, such fee would be absolute. After a limitation in fee once vests, no limitation over can take effect. The remainder to the daughters would fall to the ground, and if at any time afterwards the issue of Henry should fail, the daughters or their heirs could only take by descent from the children of Henry, and not by purchase, under the remainder limited in the will.—It is the case of a devise in fee, with a proviso that if that fee fails to vest, another estate in fee shall be substituted for it:—McCullough *v.* Fenton, 15 P.F.Smith 418.

COMMON PLEAS.

C. P. of Philadelphia

Firmin v. Firmin.

A decree of divorce obtained by fraud and collusion will always be vacated if brought to the notice of the court promptly, and before the rights of others have intervened; but when many years have been allowed to elapse, during which a second marriage had been contracted by the guilty party, and children have been born to him who would be bastardized by the annulling of the divorce, it will not be disturbed, unless the record shows that there was no cause of action.

Rule to show cause why decree of divorce should not be vacated and libel dismissed.

This rule was taken by the wife, who was the respondent, to obtain the vacation of a decree of divorce *a. v. m.* entered in 1871. The facts stated below are her own version of her case; they are partially disputed by the libelant, but the rule was discharged without calling upon him to argue.

The parties were married in London in 1847. In 1866 the wife began proceedings in an English court for the purpose of obtaining a separation on the ground of adultery; and, on April 22, 1869, after full hearing, the husband having notice and defending, the prayer of her petition was granted. During this suit no attempt was made by him to show that she had ever deserted him. He soon afterward left England and came to the United States. In 1871, his wife, upon default being made in payment of alimony, followed him, and found him in Philadelphia, living with the woman with whom the alleged adultery had been committed. An agreement was then made between them that, in consideration of a sum of money to be paid to her, she should consent to a divorce. In pursuance of this arrangement, the money was paid and a libel filed by the husband, praying for a divorce on the ground of desertion. In the course of the depositions the husband swore that his wife had deserted him seven years before, to the great astonishment of the wife, who had understood that every thing was to be done by consent, and no charge made against her. She, however, made no attempt to rebut this testimony. A decree of divorce *a vinculo matrimonii* was entered in due course, and she soon after departed for England. In 1883 she came back, and on an affidavit embodying the above facts, obtained this rule. It appeared that after the divorce, the husband had married the woman who had come over with him, and had had by her three children. The marriage took place in New York.

June 5, 1883. HARE, P.J. There is no question that this decree would have been vacated if application had been made promptly. The divorce was clearly collusive—a thing which public policy forbids, and the decision of Lord Penzance is conclusive upon this court upon the question of the husband's adultery. But there is another public policy which forbids that this decree should be opened after so long a delay, and children have been born subsequently to the divorce, who have some rights, and who, indeed, might not have been born if there had been no divorce.

If this divorce was actually void, a different case would be presented, but the record shows that there was a valid cause of action, and hence it can be considered only a voidable decree.

The respondent has had the benefit of her agreement for nine years, and therefore cannot claim any favors of this kind from the court. As far as her own convenience or advantage is concerned, she has no case. The question then is simply whether public policy demands that this divorce should be vacated. Upon this point it is our opinion that, after such a lapse of time and the intervening rights of children have arisen, the public interest would be best subserved by leaving the parties as they are.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JUNE 14, 1883. NO. 15

QUARTER SESSIONS.

Q. S. of Delaware County.

Road in Ridley.

Road Law—Defective Report.

When damages are assessed by a road jury the report must set out that the lands against which the damages are assessed are near and adjacent to the road.

When the prayer of the petitioners is that the jury may view both the old and the proposed road, and "if they should see occasion to lay out the same, to inquire of and vacate" the old road, a report which does not vacate the old road will be defective.

Exceptions to report of Jury to view, &c.

The opinion of the Court in this case sets out all the material facts.

June 4, 1883. CLAYTON, P. J. The report is defective in not setting forth that the lands of Hugh Boyd, against which the viewers have assessed damages, are near and adjacent to said road, or adjoining the same. This is necessary for the protection of the person to whom the damages are awarded. It may be that Mr. Boyd might plead the irregularity in the proceedings against him. Whether he could necessarily do so, is not now decided. When the question arises in such a way that the judgment of the court will be final and binding on the parties we will decide that question. The suggestion of the defect and the doubt as to its effect is enough to avoid the report.

I am also of opinion that by the peculiar language of the petition and order of court to the viewers, they were bound to vacate the old road if they granted the new one. The language af the petition and order is as follows: "If they (the viewers) should see occasion to lay out the same, to inquire of and vacate the public road now opened known as the Amosland road from the point of the beginning of the proposed road to the point where the said Academy avenue intersects the said public road known as the Amosland road, which last mentioned road will by reason of the laying out of the proposed road become useless. The prayer of the petitioners is that the jury shall view both and if they find the new road will supersede the necessity of the old, then to grant it and vacate the old one. They did not pray for both roads. If they desired the new road whether the old one should be vacated or not they should have so worded their petition.

The report is set aside.

COMMON PLEAS.

C. P. of Chester County.

Kennebec Ice and Coal Co. v. Wilmington and Northern R. R. Co.

Right to sue in another's name without consent—Subrogation—Insurer and Insured—Warrant of attorney—What is a sufficient warrant.

Where insurance companies have paid losses upon property destroyed by fire through the alleged negligence of a third party, they may bring suit against the wrong-doer, in the name of the assured, without his consent, and the assured cannot prevent such use of his name, or, by a release to the defendant, defeat the action.

In such case, the insurers are not obliged to wait the pleasure of the assured whether he will bring suit.

Seven insurance companies having paid losses upon the property of K., which was burned through the alleged negligence of W., instituted suit in the name of K., but without K.'s consent. Warrants of attorney having been filed, executed by the several insurance companies a rule was taken by defendant to show cause why proceedings should not be stayed until a letter of attorney was filed executed by K. An answer to the rule was filed showing the payment of the losses by the insurance companies, and the refusal of K. to institute suit or join in the suit as instituted, or authorize the use of K.'s name as plaintiff. HELD, That the warrants of attorney filed were sufficient.

Sur rule by defendant upon "the attorney who filed the narr. in this case," to file their warrant of attorney, proceedings to stay.

The attorneys of record for plaintiff had, under a prior rule to file warrant of attorney, filed warrants of attorney executed by seven certain fire insurance companies who claimed the right to bring this action of trespass on the case in the name of the Kennebec Ice and Coal Co. to recover damages from the defendant, through whose alleged negligence the ice-house of the Kennebec Ice and Coal Co. was destroyed by fire, whereby the said insurance companies were compelled to pay and did pay to the said ice and coal company certain amounts assured thereon.

In answer to the present rule, the attorneys of record for plaintiff set forth that the President of the said Kennebec Ice and Coal Co. had been requested by the said insurance companies to bring suit, for their use, against the defendant, but refused so to do or to authorize them to

sue in his name, giving as a reason that the said ice company is dependent upon the railroad company defendants for its supplies of ice. The respondents insisted that the insurance companies had the right to sue in the plaintiff's name without his consent, and that the warrants of attorney executed by the insurance companies, and already filed, were sufficient in law.

It appeared that in addition to the seven insurance companies above referreed to, the burned premises were insured in two other companies, who had not paid their losses, but who had knowledge of the bringing of this suit.

Wm. M. Hayes, for the rule.

This suit being brought in the name of the Kennebec Coal and Ice Co. against its consent, a recovery would not be a bar to a second action brought by its direction. The insurance companies are not named as equitable plaintiffs, and warrants of attorney executed by them have no affect whatever.

Hineman & Cohen and W. T. Barber, contra.

Where property insured is destroyed by the negligence of a third party, the insurer by payment of the loss, becomes subrogated to the rights of the assured to the extent of the sum paid under the policy, and may bring an action in the name of the assured for his own benefit with or without the consent of the assured, and a release by the assured would be no defence to such a suit:

Wood on Fire Insurance, secs. 473, 474
Flanders on Fire Insurance, 648
Mason v. Sainsbury, 3 Doug. 51
Western Railroad Corporation, 13 Metc. 108
Monmouth Fire Insurance Co. v. Hutchinson, 21 N. J. Eq. 117
Hendrickson v. The Philada. and Reading Railroad Company, 8 Leg. Gaz. 125
S. C., 23 Pitts 147
Hall v. Railroad Company, 13 Wallace 357
Peoria Marine Fire Insurance Co. v. Frost, 37 Ill. 333
S. C., 5 Bennett's Fire Insurance Cases, 54
Bean v. Atlantic & St. Lawrence Railroad, 58 Maine 82
S. C., 5 Bennett's Fire Insurance Cases, 341
Ætna Fire Insurance Co. v. Tyler, 16 Wend. 397
Timan v. Leland. 9 Hill 237
Gracie v. N. Y. Insurance Company, 8 John 245
Whitehead v. Hughes, 2 C. R. & M. 318
Phillips v. Clagett, 11 M. & W. 84.

The Kennebec Ice and Coal Company having declined to bring suit, and having had notice of the institution of this suit, their rights will be determined in this action.

The rights of the two insurance companies, which have not paid any losses, are not prejudiced, inasmuch as they have had notice of this suit.

May 7, 1882. FUTHEY, P. J. This action is instituted in the name of the Kennebec Ice and Coal Company against the Wilmington and Northern Railroad Company.

The plaintiff was the owner of an ice-house, situate on the line of the defendant's railroad in this county, which the declaration alleges was set fire to and burned through the negligence of the defendant, and the ice with which it was stored was destroyed, whereby the plaintiff suffered damage, etc.

The defendant obtained a rule on the attorneys of record for the plaintiff to file their letter of attorney, and also took a rule to show cause why the proceedings shall not be stayed until a letter of attorney is filed executed by the legal plaintiff.

The attorneys of record for the plaintiff presents letters of attorney from seven fire insurance companies and say that the property burned was insured by the plaintiff with them, and that they have paid to the plaintiff the insurance moneys amounting to a large sum, to wit, the sum of $15,855; that the plaintiff declined to institute suit against the defendant to recover the damages occasioned by its negligence, or to join with the insurance companies in a suit, or to authorize them to use the name of the plaintiff, although requested so to do, and that, upon such declination, they caused this action to be instituted in the name of the Kennebec Ice and Coal Company, and they ask that the letters of attorney thus presented by them shall be accepted as sufficient to authorize them to conduct the legal proceedings thus instituted.

This presents the question whether these fire insurance companies have, under the circumstances stated, the right to use the name of the plaintiff.

Where property is destroyed or injured by the negligence of a third person, so that the assured has a remedy against him therefore, the insurer, by payment of the loss, becomes subrogated to the rights of the assured to the extent of the sum paid under the policy. By accepting payment from the insurer, the assured implicity assigns his right of indemnity from a party liable to the insurer. It is clear that these insurance companies, having, as they allege, paid the insurance, have a right, if the fire was caused by the negligence of the defendant, to require that the defendant shall be made liable so that they may be reimbursed the loss occasioned them by such negligence. If the insur-

ance paid covers but a part of the loss really incurred, then both the assured and the insurer have an interest in the amount to be recovered.

The insurers, however, having paid their moneys, and by reason thereof, having been thus subrogated to the rights of the assured to that extent, cannot be deprived of their right to reimbursement from the wrong-doer by reason of the assured failing to bring suit. They have such an interest as authorizes them to institute suit in the name of the assured, and they may thus use his name without his consent, and the assured cannot prevent such use of his name, or, by a release to the defendant, defeat the action. They are not obliged to wait the pleasure of the assured whether he will bring suit.

If the assured has sustained loss beyond that paid by the insurance companies here represented, the entire liability of the defendant can be determined in this suit:

Wood on Fire Insurance, secs. 473, 474
Flanders on Fire Insurance, 648
Hart v. Western Railroad, Corporation, 13 Metcalf 108
Monmouth County Fire Insurance Co. v. Hutchinson 21 N. J. Eq. 117
Hall v. Railroad, 13 Wallace 367
Easton v. Sainsbury, Doug. (26 E. C. L. R.) 61.

The allegation of the defendant that their company is threatened with suit by the plaintiff in the State of Delaware, cannot affect the jurisdiction of this Court of the cause of action which has already attached, instituted by parties having a right to use the name the plaintiff.

We think the attorneys on record for the plaintiff have filed sufficient powers of attorney, and that the rule to show cause why proceedings shall not be stayed must be dismissed. We will, however, require the insurance companies to give security for costs.

SUPREME COURT.

Ludwig's Appeal.

A widower of fifty-seven years of age entered into an ante-nuptial contract with a destitute widow of sixty-three, whereby the latter, in consideration of a good and comfortable support during her life and a decent Christian burial, agreed to release all claim in and to her intended husband's estate. HELD That the contract was upon a sufficient consideration, and that on the husband's death the widow was accordingly not entitled to $300 exemption

Appeal of Ephriam Ludwig from a decree of the Orphans' Court of Mercer county, dismissing exceptions to an appraisement of three hundred dollars' worth of property, set apart for the use of Eva, widow of Abram Ludwig, deceased.

The facts were as follows: About July 1, 1867, Abram Ludwig, the father of Ephriam Ludwig and other children, being a widower, and possessed of property worth nearly $15,000, made a proposal of marriage to Eva Rickert, a poor and destitute widow. The same was accompanied by a request for an ante-nuptial agreement. The said Eva Rickert accepted the proposal, and assented to the request.—Thereupon the two entered into a written agreement, whereby the said Eva Rickert, for the sum of one dollar, and "In consideration of her comfortable support and maintenance during life, and a decent Christian burial at her death," agreed "to relinquish, remise and quit-claim all dower and thirds, and right and title of dower and thirds, and all other right, title, interest, claim or demand whatsoever, in law or equity, that she may acquire in the real and personal estate of the said Abram Ludwig, in case the said intended marriage be had and solemnized." On July 3, 1867, they were married. On November 25, 1881, Abram Ludwig died intestate.—After his death, ample provision was made for the "comfortable maintenance and support" of the widow, and accepted by her for two months afterwards, when she refused further to accept the terms and provisions of the said ante-nuptial settlement, and demanded her dower and rights as widow, under the intestate laws. At her request, appraisers were appointed, who appraised and set apart property to the value of $300 for her separate use.—To such appraisement and exemption Ephriam Ludwig, one of the children of Abram Ludwig, excepted.

Subsequently the court, MCDERMITT, P. J., dismissed the exceptions, and confirmed the said appraisement and exemption. Whereupon Ephriam Ludwig took this appeal, assigning for error the decree of the court.

December 30, 1882. PAXSON, J. It was decided in Tiernan *v.* Binns, 11 Norris 248, that when a woman about to marry relinquishes by an ante-nuptial contract all right of dower, and all interest of any kind whatever, to which she might be entitled in the estate of her intended husband by reason of her marriage, she waives her right to $300 of her husband's estate under the Act of April 14, 1857.

It was contended, however, that this case does come within the rule of Tiernan *v.* Binns, for the reason that the ante-nuptial contract was a fraud upon the wife;

that the provision contained therein for the latter was inadequate and disproportioned to the means of her husband, and that the case comes within the rule laid down in Kline's Estate, 14 P. F. Smith 122, where it was said that "while it might not be necessary to show affirmatively that there was a full disclosure of the property and circumstances of each, yet if the provision secured for the wife was unreasonably disproportionate to the means of the intended husband, it raised the presumption of designed concealment, and threw upon him the burden of proof:"—Kline's Estate was well decided. It was recognized in Tiernan *v.* Binns, and we have no disposition to depart from it. But we are unable to see its application to the present case. It must be remembered that in Kline's Estate the auditor found the fact that the wife had not only signed the ante-nuptial contract in ignorance of her rights, but that the extent of her husband's property had been concealed from her at the time of the execution of the contract. How stand the facts here?—Abram Ludwig was fifty-seven years of age, a widower with eleven children, when he entered into this ante-nuptial contract with Mrs. Eva Rickert, the appellee. The latter was at that time a destitute widow sixty-three years of age.—Abram was then possessed of real and personal estate worth about $14,000.—The contract itself recited the facts that "the said Abram Ludwig is seized of lands and tenements situate in said county of Mercer; also certain personal property in said county," and then provides that the said Abram and his heirs, executors and administrators, shall give and furnish the said Eva Rickert a good and comfortable support in health and in sickness for and during her life, and at her death, furnish her with a decent and Christian burial." This, with the nominal sum of one dollar is all the benefit Mrs. Rickert took under the contract.

The consideration is ample to sustain the contract if it is free from fraud or concealment.

Upon this point we have the uncontradicted testimony of Judge MAXWELL, who drew the paper. He says; "I wrote this ante-nuptial contract. My recollection is the parties and myself were alone in the office at the time this contract was written. I read it to the parties before it was executed. After I read this article I turned to Mrs. Rickert and said to her: "Now, Mrs. Rickert, if you sign this, you get nothing from Mr. Ludwig's estate except your keeping and your decent Christian burial." I said further, "I want you to understand what you are doing, for Mr. Ludwig has a large property; how much I don't know, but whatever it is, you will have no interest in it at his death—that is what the paper says." She replied to me that she understood it."

The widow was examined without objection on her own behalf, but she does not say that she did not understand the paper, or that she was deceived or misled as to the extent of her husband's estate; nor does she make any complaint of ill-treatment by the children after her husband's death. She moved away from her home because her son-in-law desired her to live with him.

There is not a scintilla of evidence to bring this case within the doctrine of Kline's Estate. If we regard the provision for the widow as inadequate, it merely throws the burden of proof upon her husband's representatives, and it has been fully met. From a sentimental standpoint the provision for the wife would not seem to be generous. But a widower of fifty-seven, with eleven children, seldom contracts a second marriage from mere sentiment.

He may have thought it was enough, in view of her age and position, to give her a comfortable home, a decent support during her life, and a Christian burial after her death. At any rate it is very clear she was of that opinion, and that is the end of the case.

It would have been wiser to have fixed a sum certain for the support of the widow. The failure to do so, however, does not take away the consideration of the contract. The estate is bound for her support and, in case of disagreement about details or amounts, the Orphans' Court has ample power in the premises.

All of the assignments except the last, are to errors in the opinion of the court.—They need not be discussed for obvious reasons. The last assignment is to the confirmation of the appraisement of the property set apart for the widow under the Act of Assembly. This assignment is sustained.

Decree reversed at the costs of the appellee, and it is ordered that the record be remitted for further proceedings.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JUNE 21, 1883. No. 16

QUARTER SESSIONS.

Q. S. of Cumberland Co.

Road in South Middleton Township.

Road Law—Terminus—Repeal of Ordinance.

A petition for a road set forth that the road was to "end at a point in the line of the borough of Carlisle, where South Street as ordered to be laid out and opened by the ordinances of that borough would meet the line of said township of South Middleton." The report set forth that they had "laid out for public use the following road," describing the termini as in the petition. By a borough ordinance three viewers were appointed, who laid out South Street and assessed damages. Appeals were taken from this award of damages, and are still undetermined. At a subsequent meeting the town council passed an ordinance repealing the 'opening ordinance,' but this repealing act was never transcribed in the ordinance book or signed by the Chief Burgess, nor ever published in a newspaper. HELD, that an exception taken to the report on these grounds must be set aside.

A road terminating at a point on the borough line has a sufficient public terminus.

Although said South Street has not yet been opened, yet there is no ordinance to prevent its being opened, and therefore this road may terminate at said point.

After the determination of the question of damages the Court can compel the opening of said South Street.

DUBITER, whether, after the passing of an ordinance to open a street, the appointment of viewers, assessment of damages, and confirmation of report, the town council can repeal the ordinance.

Exceptions to Road Report.

His Honor, Judge Herman, being interested in property along the line of the road, Hon. P. L. Wickes, of York county, heard the argument of there exceptions.

The ground of the exceptions is given in the Court's opinion.

WICKES, P. J. Seventy-five petitioners have complained to the Court that they labor under great inconvenience for want of a public road to begin in the Harrisburg and Chambersburg Turnpike at a certain point, and "bend at a point in the line of the borough of Carlisle, where South street as ordered to be laid out and opened by the ordinances of that borough would meet the line of said township of South Middleton."

Under this petition viewers were appointed and they have reported that they have "proceeded to view said route and lay out for *public use* the following road," the termini being described as in the petition.

To this report exceptions were filed, three in number—the first alone was argued—the second and third were not pressed.

The exception argued is as follows: "this report is excepted to because the eastern terminus thereof is not a public point and is in the middle of a field. South street has not been opened to the borough line and there is not even an ordinance extant requiring it to be opened."

Certain "admitted facts" were presented on the argument from which it appears that South street, in the borough of Carlisle, was never opened from its west end to the point on the borough line mentioned in this report, but that this point is now an enclosed field of Johnston Moore. It further appears that as far back as October 1870, it was enacted and ordained by the borough authorities "that South street in said borough be extended and opened westwardly * * * * to the borough limits." Immediately following this the "town council" appointed "three disinterested freeholders" to assess damages and contributions, under the provisions of the act of 1868, P. L. 848, and the viewers made their report which was "approved and confirmed *nisi*" by the councils on January 6, 1871.

Appeals were taken from this award of damages by three persons "aggrieved thereby," within the twenty days required by the act, and these appeals are still pending, undisposed of in this court. At a subseqnent meeting of the councils in May 1871, it was enacted and ordained that the ordinance "opening South street east and west to the borough line enacted into a law October 7, 1870, be and the same is hereby repealed."

This ordinance however remains in choate—it was never transcribed into the ordinance book by the Secretary or signed by the Chief Burgess, nor was it ever published in "at least one newspaper ten

days before taking effect," all of which is required to be done by the act of 1851.

Upon these facts we are asked to sustain the first exception and set aside the report.

The objections then are, if we divide the exception into such parts as will enable us the more readily to discuss it:

1st. That the eastern terminis is not a public point.

2nd. That South street has not been opened to the borough line.

3rd. That there is no ordinance extant requiring it to be opened.

In the first place it is to be observed that the general road law of 1836, (2 Purdon 1272) nowhere provides that a public road shall terminate at a public point—the 11th section of that act which provides for the laying out of roads from dwellings or plantations to a highway or place of necessary public resort," has reference entirely to *private* roads, and the 3rd section of the act requires the viewers to report "whether the road desired be necessary for a public or private road. I admit that the current of judicial construction gives color to the assumption that a public as well as a private road must have such an outlet—hence we find the courts determining what constitutes a public place, and they have held a "grist mill," and a "saw mill," a "cemetery" and a "church" to be points at which a public road may terminate.

In the case we have in hand, it is difficult to conceive a more public point in the county of Cumberland than its county seat, and we do not suppose the learned counsel who argued the exceptions intended more by his argument and exception, than that there was no way of getting beyond the inclosed field and into the borough—in other words that the road proposed is a mere *cul de sac*.

It is true that South street has not been opened to the borough line, but we do not agree "that there is no ordinance extant requiring it to be opened."

It is of course meant by this that the ordinance of 1870 is repealed by that of 1871,—but the latter ordinance has never been completed, and is now inoperative. This was recognized by the counsel who argued the exception, but he urged the view upon us that at any moment, notwithstanding the lapse of time, the necessary steps may be taken to give life to this dead enactment, and that then the pending appeals from the assessment of damages will end, and an impassible barrier erected to those who seek to enter the borough by means of this road.

It is enough for our present purpose that no such no action has as yet be taken, and it is perhaps well to suggest, that after the ordinance extending this street, the appointment of viewers to assess the damages and the confirmation of their report, it is at least doubtful whether the borough has the legal right to repeal the ordinance of 1870. Certainly not if individual rights have vested, and it would seem from the cases, that those to whom damages were awarded have acquired a vested right to the sum so awarded.—(1 Wend. 54, 520.) 2 Wr. 249.

Again it was insisted "that the appeals now pending must be disposed of before the borough authories can proceed to open the street, and that after that they may open the street or not as they see fit and that the court would have no more power to compel them to do it, than it would have to compel the legislature to enact a certain law, and that the legislature and the councils stood upon the same footing."

It is true that the questions relating to damages must be adjusted before South street can be formally opened, but when that is done, we have no doubt that those entitled to receive the money can apply to the court for a writ of mandamus to compel the borough authorities to pay the amounts, and if necessary to collect the money by appropriate assessment, and that if they refuse to open the street that

the court would have ample power to issue a similar writ and compel them to do their duty. They have the absolute right to determine whether the public convenience and interests require them to ordain additional streets or extentions of those already opened—and as it is a matter in their discretion no court can compel them to act—but after the ordinance has passed, and the question of damages settled, the right of the citizen commences, and the power of the court may be invoked. The Supreme Court long ago decided that in this regard, there is no analogy between the legislature and city or borough councils: 20 Smith 469; 7 Wright 400.

The case cited on the argument by the learned counsel who appeared for the report, was not unlike the one in hand. (Road in Jefferson and Rush Townships, 2 W. N. C. 138.) Said the court below, "An unopened state or county road may be a suitable place for the termination of a public road. When the former road is opened, according to the duty of the supervisors, it would certainly be a public point, and the newly laid out road will perhaps not be opened before the earlier one. It becomes the duty of the supervisors to open both for the benefit of the people and then the community may be accommodated with highways as fast as required." This was affirmed.

A stronger case than either is Spring Garden Road, 7 Wr. 144, the facts are imperfectly reported—but enough appears to show that the road was prayed for and laid out "to the line of the borough of York." The petition and report show more fully that the western terminus of the road was "through the improved lands of George Welsh to a post at the line of the borough of York on the east side of said borough on lands of George Welsh." The fifth exception filed to that report was that, "the western terminus of said road has no public outlet or connection with any other public road or highway." My learned predecessor in that district, dismissed the exceptions and confirmed the report, which was afterward affirmed by the Supreme Court.

No opinion was filed in the court below, but the decision doubtless proceeded upon the broad ground that the borough line was a public point, and that when the travelers over Spring Garden Road sought admission to the borough, the Councils of York would furnish an avenue through which to enter. No street had been ordained connecting with the "post on the borough line," but the authorities, mindful of their duty to the public, soon supplied the missing link.

It is no answer to these petitioners that they may reach Carlisle by other roads as was said on the argument. It was said of old that "all roads lead to Rome," and it may doubtless be said with equal truth, that in Cumberland county, all roads lead to Carlisle—but when seventy-five respectable citizens complain of the inconvenience of access to it, and the report of viewers lays out a road for public use, from which its *necessity* must be inferred, (17 S. & R. 388) it ought to require something more than the barren technicalities here interposed, to defeat the public convenience.

We are therefore of opinion, for the reasons assigned, that the first exception to this report ought not to be sustained. We think the second exception also without merit under the authority of the case above cited (17 S. & R. 388). There are other exceptions pending, relating to the damages assessed the land owners through whose property this road is laid out. They have not been argued, and until disposed of no order can issue to open the road.

For the present therefore we only dismiss the first and second exceptions.

Deeds without words convey no real estate.

Court plaster—Damages for breach of promise.

COMMON PLEAS.

C. P. of Adams County.

Socks v. Socks.

Judgment—Assignment of—Equities between original parties.

A petition was presented by the children of A., deceased, alleging that the judgment originally given by B. to C. was to secure moneys which C., as guardian of said children, had loaned to B; that the judgment had been assigned by C. to the present equitable plaintiffs, and praying the Court to set aside said assignment, and that the judgment be decreed for the use of said children. HELD, That the judgment being to C. absolutely, and having no ear-marks on it to show the presence of any secret equities and there being no evidence that the assignees had notice of such equities, the assignment will not be disturbed.

Rule to set aside assignment, &c.

The petition of Margaretta Socks, defendant in the above judgment, alleges that she being about to purchase some land as a home for herself and family made an arrangement with the guardian, with the consent of her children, to invest their money in land, and that the money secured by said judgment against her is a trust fund, invested in the property, now and ever since occupied by her and said children. This judgment was given to the guardian in his individual capacity, and not as guardian. The judgment was afterwards assigned and revived, and is now held by Edward McPherson, Margaretta Socks and Edward J. Cox. The guardian died insolvent. This rule was taken to set aside the assignment, and the judgment marked for the use of the children of Lieut. John Socks, deceased.

June 25, 1883. McCLEAN, P. J. The Court is prayed that all the assignments may be deemed invalid and set aside, and the judgment be decreed and held in trust for the use of Peter Socks, Sophia Shildt, Elizabeth Sheely and Annie Socks, children of Lieut. John Socks, deceased, and of Margaretta Socks, the defendant in judgment, on the equitable ground that the judgment represented trust funds of said children. "It is very true that the assignee of a judgment or mortgage takes it subject to all the defences of the obligor against the obligee, but it is equally true that he does not take it subject to the secret equities of third persons." This is very familiar doctrine and has been repeatedly enforced by the Supreme Court of this State. In Davis *v.* Barr, 9 S. & R. 140, it was said by Gibson J.: "It certainly is not a general principle of equity, that a purchaser for valuable consideration of the legal title to any kind of property, should take it subject to an equity of which he had no notice." And again on p. 141: "But with any agreement between the original parties inconsistent with the purport or legal effect of the instrument, the assignee had nothing to do. No such agreement is within the purview of the act; and the assignee is not bound to call on the obligor for information about matters, the existence of which he has no reason to suspect, the necessity of inquiry being limited to want of consideration and set off."

It would appear that the authorities cited by the learned counsel for the petitioners do not sustain his present attempt to set up the alleged equities of third parties against the assignees.

In the case of Jacob Frantz, for the use of John Garberich *v.* Philip Brown, 1 P. & W. 257, the parol agreement was between the obligor and obligee for the benefit of the obligor, not strangers to the bond. There is no question in the case at bar, affecting the existence or *quan tum* of the debt.

In Mann *v.* Dungan, Assignee of Morris, 11 S. & R. 75, a set off was permitted between the original parties, against the assignee of the bond. In Gochenauer *et al v.* Gooper *et al*, 8 S. & R. 203, the question was with the assignees under the Insolvent Act.

In the case of Bury, assignee of Binkley *v.* Hartman, 4 S. & R. 186, the question was a payment made by the obligor to the obligee before notice of the assignment. So it was in Wheeler, assignee of Baynton *v.* Hughes' Ex., 1 Dallas 27.

In Rundle *et al v.* Ettwein, 2 Yeates

YORK LEGAL RECORD.
VOL. IV. THURSDAY, JUNE 28, 1883. No. 17

23, the bond, was without consideration. In Reed's Appeal, 1 Harris 476, the question was as to the title to the land.

There is nothing in evidence whatever that would have put the assignees as prudent men upon inquiry. I am inclined to the opinion that in any point of view they were not subject to the duty of inquiry for such latent equities as it is sought to set up against them, and that they can stand upon their clear legal title to the judgment. The principles stated here received recent recognition and application in appeal of the Mifflin Co. Nat. Bank, reported in Outerbridge 150. The present claimants by petition are strangers to the record. The note with warrant of attorney is executed to John Socks, Sr., not as guardian. It has no ear marks whatever indicating that it was for trust funds. And still further, there is no competent or sufficient evidence that the judgment represented guardian money. We have no testimony from Mr. Woods, the attorney who drew the note, as to the nature of the debt. But what are we offered? First, the testimony of the petitioner, Margaretta Socks the obligor, who alleges in her petition that she being about to purchase some land as a home for herself and family, made an arrangement with said guardian, with the consent of her children, to invest their money in said land, and that the money secured by said judgment against her is a trust fund, invested in the property, now and ever since occupied by her and said children. She seeks to defeat the right and effort of the assignees to collect from her. Her interest and attitude are directly in conflict with the unqualified terms of the judgment and with the interests of the assignees.

The obligee assigned the judgment note just before judgment was entered upon it. She disputes and denies the lawfulness of this assignment and seeks to impress upon the fund a character which it does not bear upon the record, and all this with the mouth of the other principal party closed in death. She is directly interested in the question and case before the Court?. She will gain or lose by the decision; *vide* McMurray's Appeal, 13 W. N. C. 136.

The next witness John F. Socks does not prove anything about the consideration of the judgment, neither does John Sheely.

Peter Socks testifies in relation to it, but can it be contended that he is a competent witness? He is directly claiming for himself and others against the act of the man who is dead. Peter must certainly gain or lose by the decision in this proceeding. Neither does the calling of Peter by the respondents to depose before another officer remove his incompetency when called to testify in his own behalf. Under Sect. 2 of Act 15 April 1869, a party to the record of any civil proceeding in law or equity or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination, at the instance of the adverse party, or any of them, and for that purpose may be compelled, in the same manner, and subject to the same rules for examination, as any other witness, to testify: but the party calling for such examination shall not be concluded thereby but may rebut it by counter-testimony.

And the third section provides that the testimony of witnesses authorized by the act may be had by depositions, &c.

Well, when he is called by the adverse party his testimony does not prove the consideration of the judgment. But it weighs against his mother and himself, when he shows that he read the judgment of revival in favor of John N. Socks and Edward McPherson and explained to his mother as he was able, notwithstanding the force of this may be somewhat obscured by other statements of his not consistent with it.

Sophia Shildt, another of the parties, does not prove the issue, and she is clearly incompetent.

The standing and testimony of the last witness for the petitioners, Margaretta Socks, sen., must be examined with some care. She is the widow of John Socks the elder, and also one of the assignees of the judgment. Mr. Duncan appeared for her, but has not answered. It may be said that she testifies against her own interest, as an assignee of a part of the judgment. But the effect of this is to relieve the estate of her deceased husband and to benefit her consequently if that

estate were solvent. Her testimony is claimed to be adverse to the act of her husband in the assignment of the judgment and he is dead.

But without determining the question of the competency of this witness, and taking the testimony, what does she prove? she says: "I never saw the receipts. He (the old man) told me that he had a judgment. He told me that he had got a judgment instead of the receipts. He said nothing about giving back the receipts. He said nothing to me about the receipts." Thus seriously impairing the previous statement and on cross-examination "I can't tell what it (the judgment) was given for. My husband did not tell me what the note was taken for." In such uncertain, self-contradictary testimony sufficient for the purpose of decreeing a judgment of record to be not the property of the beneficial plaintiffs of record, but for the use of strangers of the record.

Still further Edward McPherson and Edward J. Cox in their sworn answer deny the truth of the statements made by the petitioner Margaretta Socks, in her petition, as to certain arrangements made between her and the said John Socks, Sr., for the investment of the money of her children in real estate bought by her and as to the payment thereof and the receipts given therefore. If even the testimony of Margaretta Socks, sr., was full and perfect, we might well in equity call for the testimony of more than one witness before depriving the assignees of their property, after a revival by the defendant, of the judgment to the original assignee and to Edward McPherson, and after five years have elapsed since the assignment to Mr. McPherson, and after his assignor, John N. Socks, has become insolvent, as is represented in the petition: Burk's Appeal, 39 Leg. Int. 314. Graham *v.* Donaldson T. W. 453.

Rule discharged.

C. P. of Adams County.

Heaffer v. Lingg et. al.

Judgment—Opening of—Minors.

When an arrangement is entered into with minor children, through their guardian, the rights of all parties must be carefully preserved. The children will not be allowed to profit by an unlawful act.

Defendants, being minors, gave judgment in consideration of a conveyance of land. While of course an execution on such judgment must be restricted to the land in question, they will not be permitted to refuse to pay their share of said judgment and at the same time retain their interest in the land.

Rule to open judgment, &c.

This judgment is on *sci. fa.* and *alias sci. fa.* against John E. Lingg, Joseph F. Lingg, Francina Lingg, and Jacob H. McMaster, guardian of Elizabeth R. Lingg, David A Lingg, Sarah Emma Lingg, Mary W. Lingg and Harry M. Lingg, minor children of David Lingg. The petition asked to have the judgment opened, alleging that Francina was a married woman at the time of issuing the *sci. fa.*, and that her husband was not jointed in the writ. It also appeared in the testimony that she was a minor at the time of giving the original judgment.

Wm. Heaffer conveyed the land to defendants in consideration of the judgment note in controversy. The sum of this judgment also included an indebtedness of the father of these defendants to Heaffer, and the entire arrangement was entered into in order to give defendants a clear title to the land. The petition attacked the validity of the original judgment, and all the questions raised are stated in the Court's opinion.

June 25, 1883. McLEAN, P. J. The petition verified by affidavit alleges a defence to the original Judgment No. 46 of Aug. T. 1876, on the part of the first three named defendants, in the *sci. fa.* who were the defendants in the *ali. sci. fa.* to wit John E. Lingg, Joseph F. Lingg and Francina C. Lingg, and against whom upon two returns of *nihil*, the judgment of November 15, 1881, was entered.

No defence whatever is offered upon the ground of any matter subsequent to the original judgment, except the coverture of Francina and that is deemed insufficient as appears further on and therefore the opening of the judgment upon the two *nihils* would avail the defendants nothing.

As to the judgment by confession of Jacob H. McMaster, guardian, upon the *scire facias*, he has had no day in Court in this proceeding. A rule should be served upon him to show cause why he should not become a party and why the judgment confessed by him should not be opened. It is quite plain that his act cannot bind Elizabeth B. Lingg if she was of age before the confession of judgment by the guardian, upon the *sci. ia.* But Jacob H. McMaster is the legal guardian at this time of Sarah Emma, Mary V. and Harry M. Lingg. It appears from the

testimony that he was active in the arrangement which resulted in the conveyance of the land by the plaintiff to the adult and minor children, and no advantage must be permitted to ensue to the grantees from this conveyance without the performance of any just obligation which induced the execution and delivery of that conveyance. The judgment of John F. Kuhn No. 185 of January T. 1872 was not a lien upon the life estate of David Lingg, if the fee to the land was in his wife, as she was living at the date of that judgment. The Act of 1 April, 1863, 2 Purd. Dig. 1009, pl. 33, deprived that judgment of any such effect.

Then if the levy of the *fi. fa.* after the wife's death created a lien upon the husband's life estate, it would appear doubtful whether the proceedings of sale were regular and legal, no evidence being offered of an order of Court for the issuing of the *vend ex.* or of any notice of the application for the writ being given to the tenant for life. It may be that it was the life estate that was sold by the Sheriff, the sale was void and conferred no title on the purchaser; Kintz *v.* Long, 30 Penn. St. 501: Snyder *v.* Christ, 39 *ibid* 499, *vide* last proviso to sect. 4 Act 24 January 1849, 1 Purd. Dig. 652, 653, pl. 90.

But there was a judgment in favor of Wm. Haeffer *v.* John Lingg and David Lingg, to No. 80 of November Term 1875 for $676, which was a lien upon the interest of John Lingg in real estate and also upon the life estate of David Lingg assuming that the fee had been in the wife of the latter. And it may be very reasonably conjectured as alleged in the sworn answer of the plaintiff, that the indebtedness of John and the father to the plaintiff were readjusted in the conveyance by the plaintiff to the children. In the light of the testimony to Mr. Woods, it is certainly very proper, and needful perhaps, as was suggested by the plaintiff's counsel upon the argument, that the testimony of David Lingg should be taken. I am unwilling to open the original judgment *v.* John Lingg, Joseph, Francina and the guardian, to No. 46 of August Term 1876, under the testimony presented. According to the deposition of Mr. Woods, David Lingg was the party who procured the amicable confession in that case. The act of David Lingg and the testimony of his son John are in conflict.

Whatever was just and right in the original transaction and whatever was then designed in good faith must be maintained. If there was any unlawful act on the part of David Lingg, that led to the execution of the conveyance by the plaintiff to the children, the children must not profit by it. Neither on the other hand must they suffer by it, but the principal parties should be relegated to their original position. I would remark further that in a matter of such consequence as this, Joseph F. Lingg, the absent defendant should either appear in person or be represented upon a power of attorney expressly for the purpose intended. We have a solemn record of a regular judgment against the three adult children. The petitioners have no other parol testimony than that of themselves. They have no other witnesses to testify in their behalf. The sworn answer is responsive to the material statements of the petition, and if the latter is to prevail, the answer should be overcome by the testimony of two witnesses or one witness corroborated by other circumstances and facts; Burks' Appeal, 38 Leg. Int. 314.

The petition expressly sets out that the original judgment to No. 56 Aug. T. 1876, was taken against the petitioners, as a purchase money judgment and as part payment of the consideration money of the conveyance. It is said however that Francina C. Lingg one of the three adult defendants was a married woman at the time of the issuing of the *Sci. Fa.* and that her husband was not joined in the writ, and the disposition of this woman is offered and read, in which she swears that she was born in 1856, which if true would also show that she was a minor at the time of the original confession of judgment in 1876, although it was admitted before me, upon the hearing at chambers that she was an adult at that time, the date of the deed from the plaintiff, which is even date with the confession of judgment. This party in cross-examination swears "I know I was born in 1856, because it is down in the Bible. I have a recollection of my birth. I always recollect that, I recollect that I was born on the 28th of Sept. I state that from my recollection and that is the only source." Of course some of this testimony is simply absurd. No Bible record is offered and there is no corroboration of this defendant's statement by any other witness.

And there is no allegation in the petition of her infancy, and consequently no such question was in issue, and the testimony on the subject is therefore irrelevant. It may be that the testimony is true, and if the issue is made and proper proof be adduced, ground will be constituted for opening the judgment as to her. Elizabeth Fleming gave better testimony as to her age, but speaks also of the record of her birth in the family Bible, and swears that it is at home in her father's house. David swears "I was born 23rd of February 1863, I think, no 1862. I saw my age in the family Bible, that is the way I got at it."

Such kind of testimony demands the production of the primary Evidence. In looking over the depositions it also occurs to me, that it would be well to know, if any further testimony should be taken on the subject of the time of birth of any of the defendants, and the declaration of the father are given in evidence whether such declarations were made *post litem motem* or not. 2 Starkie on evidence 606. This suggests itself, as it may be that David Lingg the father discerns, that if the rule in this case were made absolute, and the adult defendants as well as the guardian, relieved from liability under the judgment he as well as John might escape the payment of their former indebtedness to the plaintiff, and his children hold an absolute title to the land, without any equivalent for the life estate, to which the children in their petition say the land was subject. A rule will be granted on David Lingg to show cause why he should not be made a party to this proceeding and to answer, if the plaintiff desires and moves for such a rule. It further suggests itself that whilst manifest care was exercised in having a guardian appointed for all the minors, it is somewhat remarkable that an effort is now made to show that Francina was also a minor at the time of the appointment of the guardian for the others.

In Glass *v.* Warwick, 4 Wr. 140, a *scire facias sur* mortgage which was given for purchase money of real estate was sustained against a married woman without her husband being joined with her.

In Patterson *v.* Robinson, 1 Casey 81, a married woman gave her own judgment bond for balance of purchase money of land. The judgment was opened, the coverture was admitted, but judgment was given the plaintiff. See also Shnyder *v.* Noble, 9 W. N. C. 183.

So in this case, no attempt has been made to charge Francina Wise personally with the judgment, but she cannot be permitted to retain her interest in the property, and at the same time refuse to pay her share of the consideration money. Of course the judgment can only be levied upon her estate in this land and the execution must be restricted accordingly.

If the plaintiff desires to treat Elisabeth as an adult at the time of issuing of the *sci. fa.* the judgment thereon can be opened as far as she is concerned, and a *pluries sci. fa.* be issued against her and her husband. As to the minors, it is said in Wilhelm *v.* Folmer, 9 Barr 300, "it is perhaps also true that where a trustee from the nature of it, cannot properly discharge his trust, without the exercise of power over the subject intrusted to him the law conceeds to him the necessary authority and discretion, so far as is essential to effectuate the object of the trust."

In the case at bar, the Orphan's Court of Adams county, upon the petitions of Elizabeth R. Lingg and David Lingg, both being over 14 years of age, and on the petition of the father as the *procheim ami* of the other three minors, appoint Jacob H. McMaster guardian for the distinct and express purpose to secure an undisputed title to real estate in which they conceive they had an interest, and to take care of their interests in the premises. It is quite manifest that the confession of judgment by the guardian was in execution of the object of his appointment See also Miller *v.* Ege, 8 Barr 352. If Jacob H. McMaster, the guardian, becomes party to this proceeding, should he be permitted, if he was so disposed, to wrest the judgment from Mr. Heaffer or defeat the very purpose for which he was appointed?

And now to wit, June 25, 1883. The stay of execution is continued, with leave to any of the parties to move to the court to take any further action that may be appropriate, just and necessary, such leave to terminate on the 20th day of August next, and such stay and leave are granted particularly for the purpose of enabling the parties in the meantime to honestly, calmly, fairly and amicably adjust the equities between them and terminate the litigation, the lien of the levy to continue.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JULY 5, 1883. No. 18.

COMMON PLEAS—IN EQUITY.

Bierbower et ux. v. Laird and Bentzel.

Equity—Action at Law—Specific performance.

A., as surety for B., paid a judgment recovered against them. B.'s wife, to indemnify A., assigned two judgments which she held against B. Upon the distribution of B.'s assigned estate, A. received a dividend on the two judgments and also on his claim against B. by reason of his payment of the debt on which he was surety. Afterwards, E., as assignee of A., attached B.'s legacy under D.'s will and received a sum much larger than the original debt. B. and wife then filed a bill in equity, alleging that the assignment of the judgments by the wife to A. was fraudulent; or if not, that she was entitled to receive from A. and E., or either of them, the amount received by them over and above the original sum of money paid by A. as surety for B., and praying that the whole of the moneys received by A. and E., or all received by them in excess of the amount paid by A. as aforesaid, be decreed to be paid to the wife of B. HELD, on demurrer, that a bill in equity will not be in this case.

All the facts necessary to a complete remedy at law are known in this case, and the whole matter relates to a single transaction. It is clear that an adequate remedy exists at law, and therefore equity will not entertain jurisdiction.

Under such a state of affairs, the filing by plaintiff's counsel of a certificate setting forth that in his opinion the case is of such a nature that no adequate remedy can be obtained at law, will not avail to save the proceedings.

Demurrer to bill in equity.

The bill in equity substantially sets forth the following facts:

1. That the administrators of Jacob Myers, deceased, brought suit against Henry C. Bierbower and Samuel Laird (surety on a note for $625,) and recovered judgment, and that Samuel Laird, on April 5, 1879, paid counsel of said administrators $457.77 in full of the balance due on said note with interest and costs.

2. That at the time said Samuel Laird so paid said bail money for said Henry C. Bierbower, the latter was in embarrassed circumstances and insolvent. That at the same time, his wife, the said Margaret, held in her own right and as her own separate property, two several judgment-notes, each for the payment of five hundred dollars with interest from date, against her husband, the said Henry C. Bierbower; first of said judgment notes being dated April 1, 1875, payable one year after date; and the whole amount of said two judgment notes with interest thereon, being then due from said Henry to his said wife Margaret; all which the said Samuel Laird then and there well knew, and as your orators believe, the said Edward D. Bentzel, Esq., also knew.

3. That Samuel Laird, before the payment by him of the money as bail for Henry C. Bierbower, prevailed upon Margaret to consent and agree to make an assignment of her two judgment notes to him as collateral security for the indebtedness of her husband to Laird, growing out of a liability of Laird to pay the bail money, and that all monies that should be realized by him on said two judgment notes, over and above the amount of said bail money, should be paid over by him to her.

4. That on the 12th day of March, 1879 the said Samuel Laird came to the residence of the Bierbowers and produced a paper writing as follows:

"Know all men by these presents that I, Margaret Bierbower, in consideration of the sum of money due on the within judgment note, have granted, bargained, transferred, assigned and made over unto Samuel Laird, his heirs, executors, administrators and assigns, the within judgment note, together with all the benefits and advantages that may be obtained thereby. Witness my hand and seal this 12th day of March, 1879.

MARGARET BIERBOWER."

This assignment was written on the back of each of the judgment notes.

5. Judgment was entered on these notes against Bierbower, and the assignment to Laird marked on the docket.

6. Bierbower executed a deed of assignment to Laird for the benefit of creditors, excepting the wife's separate estate.

7. Before the Auditor distributing Bierbower's estate, Laird presented a claim for $790, paid by him as surety for Bierbower: and the two judgment notes assigned to him as above-mentioned. He received a dividend of $116.87, on the

claim and notes. The Bierbowers were not present at the audit, and the Auditor's report was confirmed.

8. On March 2, 1881, the legacy of Bierbower, under the will of Englehart Melchinger, deceased, was attached on the said judgments. The attachment was never served on Bierbower, no appearance was entered, and no judgment was taken against the garnishees.

9. On September 25, 1882, these judgments were assigned to E. D. Bentzel, Esq.

10. The Auditor in the Melchinger estate awarded to E. D. Bentzel, Esq., $1,454.37, of which $39.84 was for costs.

11. E. D. Bentzel, Esq., received said amount from the executors of Melchinger. This was $724.08 over and above the true balance of the indebtedness of Bierbower to Laird as surety aforesaid.

12. Alleges the retention by Bentzel and Laird, or either of them of said sum of $724.08 in fraud of the rights of Bierbower and wife, and charges:

a. That the said assignments by the said Margaret Bierbower of her said two judgment notes, to the said Samuel Laird, in manner and form as stated in the *fourth* paragraph of this bill, were null and void in law.

b. That the said assignments were obtained fraudulently, and conferred no legal rights whatever upon the said Samuel Laird.

c. That even though the said assignment of the said two judgment notes by the said Margaret to the said Laird were not fraudulent and void as to said Margaret Bierbower, yet the same were held by him as collaterals as stated in this, and all and every use the said Laird has made of said collaterals, or the monies realized thereon, in violation of said agreement to hold and use them as collateral, are fraudulent and void as to the equitable rights of the said Margaret Bierbower.

13. Wherefore, your orators, having no adequate remedy at law, pray your honorable court for relief in equity, and to this end pray Honors to order and decree that the said defendants account to your orators for the use aforesaid, for all monies received by them or either of them on the said two judgment notes, the judgments and attachments thereon, and to pay the same over to your orators for the use aforesaid, with interest thereon.

14. Or that your honors may order and decree the said defendants and each of them to account and pay over to your orators for the use aforesaid, all monies received by them or either of them on said collaterals, with interest over and above the true balance of the said indebtedness of the said Henry C. Bierbower to the said Samuel Laird, after deducting and crediting the sum of $116.87, dividends received as aforesaid by the said Laird out of the assigned estate of H. C. Bierbower; and that your orators may have such other and further relief in the premises as to your Honors shall seem meet and the nature of the case may require, and to that end may it please your Honors to award a writ of subpœna, &c.

To this bill the defendants filed the following demurrer:

The defendants demur to the whole bill of complaint of said plaintiffs, and for cause of demurrer show:

First—The defendants have not by their said bill made or stated such a case as doth or ought to entitle them to such relief as is therein sought or prayed for from or against the defendants.

Second—There is a complete and adequate remedy at law for the plaintiffs against the defendants, to redress the said alleged grieviences set out in the plaintiff's bill of complaint; and their remedy for said alleged greviences is not in equity.

Wherefore the defendants do demur to said bill of complaint, and pray the judgment of the Court whether they shall be compelled to make any other or further answer to said bill, and pray to be hence dismissed with their reasonable costs, in their behalf sustained.

Plaintiff's counsel on the argument filed the following paper:

I, H. L. Fisher, counsel filing the bill in this case, hereby certify that, in my opinion, the case is of such a nature that no adequate remedy can be obtained at law, and that the remedy at law will be attended with great additional trouble, inconvenience and delay; and I hereby respectfully ask leave of the Court to be allowed to file this certificate as amendatory of the bill in this case.

John W. Bittinger, for demurrer.

H. L. Fisher, contra.

July 2, 1883. WICKES, P. J. The certificate filed by plaintiff's counsel after the argument of the demurrer, will not avail to save the proceeding. It is clear that an adequate remedy exists at law, and it is conceded that when such a remedy is open, equity will not entertain jurisdiction.

This is really in the nature of a proceeding to compel the specific performance of a contract, although not placed upon that footing, nor could it be, as it is not sought to have the property assigned returned in specie, nor is there any uncertainty as to the measure and calculation of damages. (Brightley's Equity 184-5.) But it is said an action of account render would have lain on the common law side of the Court, and that therefore after filing the certificate above referred to under the provisions of the Act of 1880; (Purdon 591, pl. 4.,) the plaintiff has a right to proceed by bill in equity. Account render however would be a most inappropriate remedy under the facts set forth in the bill.

The first judgment in such an action is properly *quod computet*, and then either by Auditors or by a jury in the sound discretion of the court, an account is settled and a balance ascertained.

The acts 1840 and 1831, provide for the compulsory production of "books, documents or papers as may appear to be necessary for a full and equitable adjustment of the controversy." But all this would be an idle ceremony in this case, in which all the facts necessary to a complete remedy at law are already known, and where the whole matter relates to a single transaction. 3 P. & W. 297; 6 Wh 625; 5 Wr. 112. Mrs. Bierbower assigned two judgment notes to Laird one of the defendants, out of which to reimburse himself for any loss he might sustain by reason of his suretyship for her husband. The precise amount he received, and the amount necessary to make him whole, have already been ascertained, and are specifically set forth in the bill.

It is said, first—That the assignment of the judgment notes were fraudulent and void. And, secondly—If not fraudulent and void, that under an express agreement the plaintiff is entitled to recover whatever balance remains in Laird's hands. There would seem to be no difficulty about sustaining a common law action about such circumstances. Said the Court in Lee *v.* Gibbons, 14 S. & R. 111, "a man may disaffirm the act *ab initio* by reason of the fraud and bring his specific action and recover his actual damages, or affirm it and demand the money—he may make his election." Why may they not in this case, do the same? I am of the opinion that the demurrer be sustained, and the bill dismissed at the costs of the plaintiff.

COMMON PLEAS.

Spangler v. Keystone Mutual Benefit Association.

Life Insurance—Suit against Mutual Company—Forum.

A was insured in York in the defendant company, which has its office in Lehigh county. Afterward, she assigned the insurance to B., then moved to Baltimore, and died there. B. brought suit against the defendant company in York county, the writ being directed to the Sheriff of Lehigh county, and by him served on the defendant.—HELD, that the service must be set aside.

The Act of 1857 permits suit to be brought in the county where the property insured is located; this is tantamount to saying where the property insured is destroyed. The place where the loss occurs determines the jurisdiction, for then only does the right of action accrue. So in life insurance, the place of death is the place of loss, and the suit must be brought in that forum.

Rule to set aside service of writ.

The grounds for the rule are given in the Court's opinion.

V. K. Keesey for rule.

E. W. Spangler, contra.

July 2, 1883. WICKES, P. J. The company defendant was incorporated under the laws of this State, and has its principal office at the city of Allentown, in Lehigh County. Suit has been instituted by the plaintiff in this county, and we are asked to set aside the service of the writ.

The admitted facts disclose that Louisa Rousch resided in the Borough of York at the time the company's certificate of insurance was issued upon her life, to wit, on August 29th, 1878. That she assigned the said certificate of membership to the plaintiff on the 16th of September, 1878, who was at that time, and continues to be a resident of this county. That on the 28th day of November, 1879, Louisa Rousch moved to the city of Baltimore, in the State of Maryland, and resided there until her death, which occurred October 28th, 1882.

Suit was brought in this county, and the writ directed to the sheriff of Lehigh County, and returned served by him, under the supposed authority of the acts of Assembly, approved April 24, 1857, (P. L. 318,) and its supplement of April 8, 1868, (P. L. 70.) The original act permitted suit to be brought "in any county where the property insured may be located, and to direct any process to the sheriff of either of the counties of this commonwealth." The supplement of 1868 declares that all the provisions of the former act "shall apply to life and accident insurance companies."

To say in the act of 1857 that suit may be brought in the county where the property insured is located is tantamount to saying in any county where the property insured is destroyed, and hence the location of the property destroyed would determine the jurisdiction in which suit could be brought.

The act does not say "where the party resides at the time the insurance is effected," nor does the place of assignment or the place of residence of the assignee settle the jurisdiction. In the first act it is the location of the property destroyed, for then only does the right of action accrue, and in the supplement it is as we have said, and, for the same reason, where life becomes extinct or the accident occurs.

This view of the acts of assembly does not, we think, conflict with the decisions of the Supreme Court in Quinn *v.* Fidelity Beneficial Society and Spangler *v.* Penn. Aid Society, 4 YORK LEGAL RECORD 33 and 34; 12 W. N. C. 311 and 312. In the latter case it is said "the insurance was effected in York County—the subject of the risk died there," indicating that something more is necessary than a residence in the county at the time the certificate of membership is issued. Certainly in the absence of an assignment, her legal representatives living in Baltimore, and sueing in this State, could not select this forum, but would be required to sue in Lehigh—why then should the assignee, whose rights are derived directly through the insured, enjoy a more extended privilege in this regard.

We think the service of this writ must be set aside.

Vendor and Vendee—Change of possession.—A change of location of the property is not essentially necessary. If the purchase was in good faith and for a valuable consideration, followed by acts intended to transfer the possession as well as the title, and the vendee assumed such control of the property as to reasonably indicate a change of ownership, the delivery of possession cannot, as matter of law, be held insufficient—*13 Pittsburgh Legal Journal 453.*

Blue, Green and Gray are the names of three merchants doing business in the Bowery, New York, within a block of each other.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JULY 12, 1883. No. 19.

COMMON PLEAS.

Thomas, Chambers & Co. v. Everhart & Co.

Sale——Personal Property——Change of Possession.

J. & Co., being indebted to T., C. & Co., sold to them a powder car, with the understanding, however, that J. & Co. were to have the use of it by paying switch charges and a certain sum per year. The car was removed from the switch upon which it was standing, to another. Seven or eight days thereafter the car was used by J. & Co., and afterwards; and finally, while so used, was attached and sold as the property of the said J. & Co. HELD, in an action of replevin, brought by T., C. & Co. against the purchaser at the constable's sale, that the plaintiff could not recover.

The removal of the car from one switch to another, was a sufficient change of possession to vest the property in the plaintiff.

The agreement that J. & Co. were to have the use of the car by paying "the switch rent, repairs and $18 per year," was such a qualification of the plaintiffs' possession as to render the sale fraudulent in law.

The possession of the car by the plaintiffs was not so continued as to make it available to them against the claims of the creditors of J. & Co.

The report of the Referee in this case, (Hon. Thomas E. Cochran, now deceased,) although never excepted to, and therefore not confirmed by any judicial action thereon, is nevertheless so decisive of the question involved, that, upon request, we have given it place in our columns.

The suit was replevin, brought by the plaintiff for one four-wheeled house car of the alleged value of $354.00, claimed by the plaintiffs to belong to them. The defendants claimed property, gave bond to the Sheriff, and retained possession of the car.

A. N. Green for plaintiff.

Blackford & Stewart for defendant.

The Referee's report is in substance as follows:

First. On the 5th day of September, 1870, Jacob Johnson and Milton S. Johnson, then partners in the business of manufacturing powder, were indebted to Thomas, Chambers and Co., the plaintiffs in this suit, and on that day sold to said plaintiffs the car, which is the subject of the present action, in part settlement of that indebtedness, for the sum of $300, for which they received credit on the plaintiffs' books.

Second. That Jacob Johnson was the member of the firm of M. S. Johnson & Co., who conducted this transaction with the plaintiffs, and that at the time when the sale was made, it was the understanding that M. S. Johnson & Co. were to have the use of the car on paying for it—it was so stated at the time the plaintiffs bought the car—that Jacob Johnson said that he was to have the use of it according to agreement, and that Mr. Holland, one of the plaintiffs, with whom the sale and purchase of the car was negotiated, said that Johnson should have the use of the car by paying for it. Accordingly, either at the time of the transaction above referred to, or in a short time afterwards the terms on which M. S Johnson & Co. were to have the use of the car, and the amount of "rent" to be paid by them was definitely settled and agreed upon between Jacob Johnson and the plaintiffs. The car was never used by the plaintiffs; but having been constructed for the special purpose of transporting powder, was used by M. S. Johnson & Co. until the dissolution of that firm in 1872 or 1873, when M. S. Johnson went to Chambersburg and went out of partnership, and afterwards by Jacob Johnson until its sale under execution as hereinafter mentioned.

Third. That the day after the sale of the car by M. S. Johnson and Co., to the plaintiffs, Thomas G. Cross, Esq., the clerk of the plaintiffs, gave directions, in compliance with their instructions, to have the car removed from the switch of Geo. A. Barnitz, to which it was locked by a chain around the wheel, to the switch of John M. Brown, a short distance from Barnitz's, and the removal was made by some employee of the Northern Central Railway Company with whose track both switches were connected, where the car was seen two or three days afterwards, and was then in the possession of the plaintiffs.

Fourth. That on the 16th day of July, 1874, the car, being in the possession of Jacob Johnson and in the county of Baltimore and State of Maryland, process of attachment was issued by Henry Weir, a Justice of the Peace of said county, on the oath of one Jarrett Cole, representing that Jacob Johnson was indebted to the affiant in the sum of $13.36, and was not a resident of, and did not reside in the State of Maryland. Similar proceedings were had at the instance of Pleasant Hunton, on the 15th, and Thomas J. Hunton on the 18th day of the same month and year, for $70.62 and $14.89 respectively. Joseph W. Nelson, the constable, to whom the writs of attachment at the suits of Jarrett Cole and Pleasant Hunton were issued, returned that he had "levied on the rights and titles of the said Jacob Johnson in and unto one powder car and contents." On the 15th of August, 1874, the justice entered judgment of condemnation of the property attached as of the goods and chattels and effects of Jacob Johnson, defendant, and on the 18th day of the same month and year, issued an execution to the same constable commanding him to sell the attached property, including the car in controversy in this case, to the defendants who paid the amount of the purchase money to the officers, and received possession of the car.

Fifth. That the value of the case at the time of the sale of the Constable to the defendants on the 31st day of August, 1874, was $175.00.

The facts thus found constitute, as I believe the material facts in the car, as proved and necessary to its determination.

The plaintiffs contend that they establish such a sale by M. S. Johnson and & Co. to them as will protect the property from levy and sale at the suit of creditors of M. S. Johnson & Co., or Jacob Johnson. The defendants deny this contention of the plaintiffs, and insist that the property, being in the possession of Jacob Johnson, at the time of its attachment, levy, condemnation, execution and sale to them under legal process in Maryland, their possession and title to the car are good and available in law against the plaintiff's claim.

The first question that seems to suggest itself is, was the sale by M. S. Johnson & Co. to the plaintiffs on the 5th day of September 1870, attended or followed within a reasonable time thereafter, with an open, complete and actual possession of the property?

If it was not, the sale was not valid against creditors. The evidence seems clearly to establish the fact that such possession of the car was taken. It is said that "the delivery must be actual, and such as the nature of the property of the thing sold, and the circumstances of the sale, will reasonably admit, and such as the vendor is capable of making;" Billingsly *v.* White, 9 P. F. Smith 464; McMarlin *v.* English, 24 P. F. Smith 300; McKibben *v.* Martin, 14 P. F. Smith 352. In this case the subject of the sale was a railroad car. It could not be removed from the track for use in any other way; it was fitted only for transportation by rail. The very next day after the sale steps were taken for its removal from Barnitz's switch, to which it was fastened by chains, to Brown's switch, some distance —not far off; where it remained, and the plaintiffs had it under their dominion and control. If there had been no arrangements between buyer and seller at the time of purchase and sale to qualify the rights of the purchasers, and if the *possession had been continued in them*, I have no doubt that the transfer of possession would have been effectual.

The second inquiry that arises is, was there any stipulation connected with the purchase and sale of the car, by which the vendors retained a beneficial interest in the property for their own interest or advantage? At the very time of the sale, according to the testimony of the plaintiff's witnesses, it was agreed be-

tween the parties that M. H. Johnson and Co., and Jacob Johnson should have the right to use the car by paying for it, and in accordance with that agreement, in about a week or ten days we find the car in their use and possession. The purchasers never used it—it was used only by the vendors. The testimony of Jacob Johnson, a witness called by the plaintiffs, and the one who effected the sale to them, or one part of it, was—"we were to *keep* the car, and pay them $18 a year, the switch rent and repairs." It was a powder car, exactly adapted to the uses of the uses of the firm of M. S. Johnson and Co., and of Jacob Johnson, who were manufacturers of powder. They had an advantage in thus bargaining for the use of the car, as is evident from Johnson's studied reference to it, when after the transaction was closed, he and M. Holland went to the plaintiff's clerk and told him of the sale. Johnson then said "he would have to have the use of the car according to the agreement." Was not this a reservation of the property for the use and benefit of the vendors? "It was part of the transaction and contemporaneous with its consumation." It qualified the delivery of the possession of the car to the plaintiffs with such stipulations in favor of the vendors, as to render "the sale, whether fraudulent in part or not, clearly fraudulent in law, because there was no such change of possession as the law requires in order to render a sale valid as against creditors: "Bentz *v.* Rockey, 19 P. F. Smith 71.

A third inquiry that arises is, was the possession of the car taken by the plaintiffs so continued as to make it available to them against the claims of creditors of M. S. Johnson and Jacob Johnson. We find it back in the hands of the vendors in a short time. Johnson testified that he took the first load of powder in that car after the 6th of September, some six, seven, eight or ten days, to Hagerstown or Chambersburg. In Miller *v.* Garman, 19 P. F. Smith, 134, the Supreme Court said—"But in this case before us, the possession taken by the plaintiff was not exclusive. At the most it was only concurrent, and it continued but seven or eight days, and was then surrendered, when the vendor had the exclusive possession and carried on the business just as he did before the sale; . . . . and if the possession for the seven or eight days succeeding the sale had been conclusive, instead of covenant, it would not have vested the title in the plaintiff because the possession was then surrendered to the vendor. Change of possession must not only be actual, but it must be continued in order to render a sale valid as against the vendor's creditors." In Webster *v.* Peck, 31 Conn. 495, cited in Davis *v.* Bigler, 12 P. F. Smith 242, this doctrine is stated: "Where the vendor of a horse within a week after the sale hired him of the vendor and was using him to all appearance as his own in the same manner as before the sale, it was held a restoration of the possession." See also Twine's Case, and notes, 1 Smith's Leading cases, Part 1, beginning on page 34, and especially page 77. The possession of personal property is always a leading index of ownership; and if not real, tends to give a false credit, and to lead to the perpetration of frauds upon innocent parties. In the present case, the possession by the vendees was not so continued as to make the sale valid against the creditors of the vendors. As Jacob Johnson continued in possession of the property after the dissolution of the firm of M. S. Johnson & Co., his creditors could seize and sell it in satisfaction of his debts.

The defendants' counsel submitted to the undersigned in writing and requested him to answer in like manner three several points, which are attached to this report. I answer that the said points are all correct propositions of law, and, referring to the views above expressed, also that so far as they are applicable to the

facts of this case, they are correctly stated. I deem it unnecessary to give distinct and detailed answers to each, as the above report sufficiently defines my views of the law of the case applicable to its special facts, and particular answers to the points would consist of mere repetition of what I have already said.

On the views which I entertain of the facts and law of this case, I am of the opinion that the plaintiffs have no cause of action, and do, therefore render my award in favor of the defendants.

The defendants points were as follows:

1st. If Johnson, the alleged vendor of the plaintiffs, sold to plaintiffs the car in question, but retained possession of said car, and continued to use it as before said alleged sale, the transaction as a sale was fraudulent and void as against the creditors of the vendor of the plaintiffs, although no actual fraud was intended by the parties, and the plaintiffs are not entitled to recover in this suit:

Garman v. Cooper, 22 Smith 32.
Trunick v. Smith, 13 P. F. Smith 18.

2d. If Johnson, the vendor of the plaintiffs, actually sold the car in question to the plaintiffs; and if at the time of the sale, or within a reasonable time thereafter, the plaintiffs took possession of the said car, and within a few days subsequently re-delivered said car to their vendor, Johnson, and Johnson continued, after such redelivery to him, to use said car as his own, and his name remained upon the car, as before such sale to plaintiffs, the sale as between the creditors of Johnson and his vendees was fraudulent, and the plaintiffs are not entitled to recover in this suit:

Garman v. Cooper, 22 Smi. 32.
Davis & Pugh v. Bigler & Son, 12 Smi. 242.

3rd. That to constitute a valid sale of personal property as against creditors of a vendor there must be an open, complete and actual possession of the property taken by the vendee at the time of, or within a reasonable time after the sale, which possession must be continued and notorious as against the vendor, *i e*, the property must either pass from the seller to the buyer, or the seller must pass away from the property leaving it in the possession of the buyer:

Garman v. Cooper, 22 Smi. 32.
Worman v. Kramer, 23 Smi. 385.
Davis v. Bigler, 12 Smi. 246.
Barr v. Reitz, 3 Smi. 256.

[This case reminds us of another of a somewhat similar nature, in which Wm. Hay, Esq., now deceased, (and law partner of Mr. Cochran) was Referee. That was the case of Tochterman *v.* Adams Express Company, 1 YORK LEGAL RECORD 165. The goods of the plaintiff, John Tochterman, Jr., were attached in Maryland and sold as the property of John Tochterman (plaintiff's father.) The Adams Express Company were served as garnishees in the attachment, but failed to appear. They notified plaintiff of the attachment, but misinformed him regarding the time within which to attend to the matter, and when he arrived at Baltimore the goods were sold. He brought suit against the company, and the Referee found for the plaintiff.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Justice of the Peace—Set-off—Two suits.—Suit was brought before a justice of the peace for the price of a barrel of coal oil, and judgment given for the full amount of the claim. The defendant had complained before suit that there was a leakage, and subsequently brought suit therefor, before another justice, who gave judgment in his favor. HELD, on certiorari, that the proceedings before the second justice must be reversed, as the demand should have been presented as a set-off in the first suit.—*Armstrong v. Johnson*, (Chester C. P.) 2 Chester County Reports 64.

VERNON, the star route juror who was seized with fits, some said delirium tremens, in the court room, has fallen heir to a large sum of money.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JULY 19, 1883. No. 20.

QUARTER SESSIONS.

Q. S. of Luzurne County.

Commonwealth v. Taylor.

The act of Assembly of the 8th of June, 1881, entitled "An act to provide for the registration of all practitioners of medicine and surgery," is a constitutional and valid statute, and not within the prohibition as to laws ex post facto.

A vested right or property in a business calling or profession can only exist when the pursuit or practice of it is in conformity with the law of the land.

The opinion of the court was delivered June 23, 1883, by

WOODWARD, J.—The defendant was convicted upon two indictments preferred against him under the act of Assembly of June 8, 1881, entitled "An act to provide for the registration of all practitioners of medicine and surgery." One of these indictments charges that he did "wrongfully and unlawfully engage in and pursue the practice of medicine and surgery for gain and reward in the city of Wilkesbarre, not being a graduate of a legally chartered medical college or university having authority to confer the degree of doctor of medicine, and not having been in the continuous practice of medicine or surgery in this Commonwealth since 1871," etc. The other indictment charges that the defendant did unlawfully and falsely make affidavit to a statement that he had been in the continuous practice of medicine and surgery in this state since the year 1871, which affidavit and statement were filed and registered in the office of the prothonotary, in accordance with section 5 of the act of Assembly of June 8, 1881. The two cases were, by consent of counsel and with the approval of the court, tried together. The result of the trial was a general verdict of guilty, and the case is now before us on a motion in arrest of judgment and for a new trial, founded on two reasons, which are, first, that the act of Assembly of June 8, 1881, is an *ex post facto* law, and therefore unconstitutional; and secondly, that the court erred in admitting in evidence the affidavit of the defendant filed it the prothonotary's office, the same having been sworn to before a deputy, instead of the prothonotary himself.

The constitution of the United States, in article i, section 10, provides that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. The constitution of Pennsylvania also declares, in article i, section 17, that "no *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

Is the act of Assembly of June 8, 1881, an *ex post facto* law? If so, is it unconstitutional and void?

An *ex post facto* law is thus described by Mr. Justice Blackstone: "When, after an action (indifferent in itself) is commited, the legislator then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who had committed it."

In Cooley on Constitutional Limitations it is said that a law comes within the intent of the prohibition when "it makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action." Cooley on Const. Lim., star page 265.

An *ex post facto* law is one which makes an act punishable in a manner in which it is not punishable, when it was committed; Fletcher *v.* Peck, 6 Cranch. 138; Lane *v.* Nelson, 2 W. N. C. 216.

There is a distinction to be noted between laws *ex post facto* and those which are objectionable merely because they are retrospective. Every *ex post facto* law must necessarily be retroactive, but every retroactive law is not *ex post facto*. The former are prohibited by the constitution; the latter are not. A law that takes away, or impairs rights vested agreeable to existing law is retrospective, and may be un-

just, but it is not necessarily unconstitutional. There is nothing in the constitution of the United States, nor of Pennsylvania, to prevent retrospective legislation, provided it does not impair the obligation of a contract, or change the punishment of a criminal act. See Lane *v.* Nelson, *supra*.

With these definitions and distinctions clearly in mind, let us see in what way, and with what effect they are applicable, to the present case. Dr. Taylor, the defendant, was indicted, not for having practiced medicine and surgery without a diploma, or without a continuous experience and practice of ten years, prior to the passage of the act of June 8, 1881; but, on the contrary, the offence charged was a violation of the statute after its passage, in continuing to practice in violation of its provisions. The date of the offence set out in the indictment is the 2d of October, 1882, or a point of time some sixteen months later than the date of the statute. He was not tried, and is not to be punished, for anything done, or omitted to be done by him, prior to the 2d of October, 1882. Nothing done by him before the act of Assembly, and which was then innocent, is now made criminal, nor is he charged with any offence of that character. But it is alleged against him that, after the passage of the act of June 8, 1881, and with full knowledge of its requirements, he continued in the practice of a profession for which he did not possess the necessary legal requirements. In other words, the precise question in the case is this: Did Dr. Taylor, on the 2d of October, 1882, hold a diploma as a graduate of a legally chartered medical college or university, having authority to confer the degree of doctor of medicine; or, not having such diploma, had he been in continuous practice of medicine and surgery in this Commonwealth since the year 1871? As he makes no claim of being a graduate from a medical college, the question is narrower still. And this question of continuous practice since 1871 was distinctly submitted to the jury as the important question of fact in the case under the evidence.

Again, it must be remembered that the defendant has recognized the force of the obligation imposed on him by this act of Assembly. He did not refuse to be bound by it, and challenge its validity. On the contrary, he presented himself at the prothonotary's office, and made the required affidavit, which was duly filed and registered. He was charged with having sworn falsely, and this issue, as we have said, was tried before the jury, and fairly submitted to them as a question of fact. In this respect, the present case is to be distinguished from that of Com'th *v.* Wasson (2 YORK LEGAL RECORD 211), decided by Wickes, J., whose opinion was handed to us at the time of the argument.

Something was said during the argument to the effect that the statute in question might be obnoxious to the objection that it would deprive the defendant of his property, without the judgment of his peers, or due process of law. But what vested right or property can a man have in a profession, unless he conforms to the law of the land in his pursuit and practice of it? A familiar illustration might be found in our system of granting licenses for, and regulating the manufacture and sale of, intoxicating liquors. A man may have a natural and full vested right to spend his money as he pleases. He may invest it in wines and liquors to any extent, but if he desires to dispose of them to others as a dealer, he must do so in conformity with the restrictions of the statutes. The same spirit animates and pervades all those laws, which compel the inspection and branding of flour and meal; the inspection of whiskey; the compulsory suppression of all kinds of business dangerous and detrimental to the safety and health of a community; and the power of taxation, almost unlimited, reposed in the Legislature. The right to compel a lawyer to pursue, for a certain

time, a prescribed course of study, and to submit himself to the ordeal of an examination, as a condition precedent to entering upon the practice of the profession of the law, and receiving its emoluments, has never been successfully questioned, and this in the absence of any positive statute on the subject. Under the common law of England, all persons desirious of following any trade were obliged to serve a regular apprenticeship of seven years, and an attempt to engage in a trade without having first served an apprenticeship was made punishable under the statute of 5 Elizabeth, c 4. See 2 Blackstone Com. 159, 197. And it would seem that all the arguments drawn from considerations of the welfare of the public, and the general good, apply with peculiar force to the profession of medicine and surgery. In no other avocation or profession is mere pretence and quackery so common, and in no other is it so difficult to detect and demonstrate their existence.

We are of the opinion that the act of Assembly of June 8, 1881, is not an *ex post facto* law, but that it is, in all respects, a valid and constitutional statute.

We are also of the opinion that the deputy prothonotary might administer the oath, as was done in the present case. In Commonwealth *v.* Greason (5 S. & R. 332) it was held that a deputy clerk of the peace has power to administer the oath required on the registry of a negro or mulatto servant, although the act required the clerk to administer it. The language of Tilghman, C. J., is as follows: "By this act the clerk of the peace is authorized and required to administer the oath; and as it was well known that it was usual for the clerks of the peace to appoint deputies, there can be no doubt but it was the intent of the act that, in such case, the deputy should administer these oaths." This case was decided in 1819, and was followed, in 1828, by the case of the Commonwealth *v.* Allen (17 S. & R. 285) where the court says: "It has never been questioned, nor can it, that a prothonotary may make a deputy, and a deputy may do all acts which his principal can do." See also the case of the Commonwealth *v.* Jermon (29 Leg. Int. 165), which was a prosecution for perjury, and where the oath was administered by a deputy prothonotary, and held to be sufficient.

The motion in arrest of judgment and for a new trial are denied.

ORPHANS' COURT.

O. C. of Chester County.

Guss's Estate.

The principles which govern cases of claims between parent and child, have application to cases between persons standing in the relation of step-mother and step-son, where a family relation exists between them.

In such cases there must be proof of an express contract to pay for services or boarding; before there can be a recovery.

If an actual agreement to pay be proved and the sum be not expressed, a quantum valebat will be implied.

Per FUTHEY, P.J.—It is not held essential that a witness should be present with the parties to hear their bargain.—The question always is whether the parties contemplated payment and dealt with each other as debtor and creditor.

The facts appear by the opinion of the Court.

May 7, 1883. FUTHEY, P.J.—Ann Guss, the decedent, was the widow of Samuel Guss, who, when she married him, was a widower with a family of children. Her husband died in 1859, and, within a year thereafter she went to live with her step-son, Col. Henry R. Guss, who was engaged in business for himself, and resided with him until her death in 1881, at an advanced age.

Col. Guss claims that the decedent was indebted to him at the time of her death for six years boarding, at $4 per week. The contention in this case is about this claim.

There is no doubt that the principles which govern cases of claims between parent and child, have application to cases between persons standing in the relation of step-mother and step-son, where a family relation exists between them. (Duffy *v.* Duffy, 8 Wright 399; Douglass' Appeal, 1 Nor. 169.) In such cases there must be proof of an express contract to pay for services or boarding before there

can be a recovery or allowance therefor. It is not held essential, however, that a witness should be present with the parties face to face to hear their bargain. The degree of proof to establish it cannot be the same in all cases. The question always is whether the parties contemplated payment and dealt with each other as debtor and creditor. And a contract to pay for services or boarding may be express and binding without all the terms being defined. The first is an actual agreement to pay, and if the sum be not expressed it will be implied to be the value. A contract of this kind should not be confounded with a parol contract for the sale of land. It must appear however, that the person sought to be charged assumed a legal obligation capable of being inforced. Loose declarations, expressive of an intention to pay, will not constitute an agreement to compensate. (Miller's Appeal, 39 Leg. Int. 479; Leidy's Appeal Ibid.)

It appears that the decedent had in the hands of Col. Guss, on loan, the sum of $2050, and that he owned real estate upon which she had a dower mortgage, from which she was entitled to an annual interest of $63.92. We gather from the testimony that they had an agreement by which she was to pay him board from the interest coming to her from the moneys in his hands, although the amount per week does not seem to have been definitely fixed. Col. Guss, called as on cross-examination, testified that on July 15, 1876, they had a settlement in which she paid or allowed him for board in full up to that time, although he does not now remember the amount paid. From that time to her death they had no settlement. No payments were made by him to her of the interest accruing on his note of $2050, or of the annual dower of $63.92, or any demands made by her therefor, except of some small sums given her at her request, and during the same period he made no demand on her for the payment of board. Her idea, he says, was that the interest on his note and the dower interest in his hands, ought to keep her, and that she considered the one about balanced the other. A witness called testified that the decedent said to her that she expected to pay her board wherever she went; another, that she said to her that she had a dower of $186 per year which she considered paid her board; that she told her this on several occasions and appeared anxious that people should know she paid her board. It appears further that Col. Guss removed part of his family from the hotel he had been keeping to a private house, still retaining his ownership in the hotel, which was conducted by his daughter and by a brother; that the decedent removed with him, but soon returned to the hotel, deeming it pleasanter to be in her old home, and said to a son of Col. Guss, that the Col. insisted on her staying in the new home, but that she could not see that it made any difference to him where she stayed, because she paid her own board with the dower and interest money that he had; and he further says she told him the amount of these moneys, and that she had several conversations with him afterwards of this character.

We think it clear that a contract relation existed between Col. Guss and the decedent, with reference to payment for her board, from her dower and interest accruing in his hands, and that this accounts for the non-payment by him to her of such dower and interest, or any demand by her therefore during the period since the settlement referred to. The provisions of the will of the decedent also support the view that there was this contract relation.

The question remains, what amount he should have? The testimony speaks of her saying the moneys in his hands, $186 a year, should keep her. It further appears that Col. Guss and his brother, in making a settlement of their partnership accounts in running the hotel took into consideration the boarding of the dece-

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JULY 26, 1883. No. 21.

dent, and settled it between them upon a basis of $3 per week. We do no injustice to the estate of the decedent, or to Col. Guss, in adopting this sum as a sufficient compensation, and allowing him for her boarding at that rate from the date of his settlement with her July 15, 1876, to her death, Nov. 1, 1881. He has been charged in the account of the executrix with the accumulations of interest and dower between these dates, and should, therefore, have credit for the amount owing for boarding during the same period.

SUPREME COURT.

Feig et al. v. Meyers.

Although the whole of a deed be not written by the same hand, in the absence of erasure or interlineation the presumption is that it was all written before sealing. The burden is on the other side to show that an alleged alteration was subsequent to delivery of the deed.

A married woman alleging that at her suggestion her husband purchased land for her and that she furnished the money for all the payments, must show that she had the means to buy with, and that she so applied those means in payment of the purchase money.

The owner of land is not estopped from setting up his title against judgment creditors, though they had no actual or constructive notice of his title at the time they gave credit or filed the judgment against the occupant. A married woman is not bound to record her deed under pain of losing her land if seized by her husband's creditors.

Evidence of the declaration of a party in possession, in some circumstances, is admissible in his own behalf to show how he claimed, or the extent of his claim, but not to show that he had paid for the property, or that it had been vested in him by deed or otherwise.

Error to the Court of Common Pleas of Somerset county.

Emanuel J. Meyers, husband of Rebecca C. Meyers, who is the plaintiff below and defendent in error, purchased as her agent and for her, on the 25th of March, A. D. 1870, the property in dispute for the sum of $2,004, at the trustees' sale of the real estate of Charles Heffly, deceased,—Charles Heffly leaving a widow and mother, but no issue. Rebecca C. Meyers, on the day of the sale paid out of her own separate estate $304, being the amount required to be paid to cover expenses, etc., and $1,700 were to remain on the premises a lien to secure the two dowers—one to the widow and the other to the mother. The sale was confirmed to Emanuel J. Meyers, on the 5th of May following, without the knowledge or consent of Rebecca C. Meyers. The trustees executed and delivered a deed to Rebecca C. Meyers on the 10th of June, 1870. It is true that Emanuel J. Meyers signed the bond to secure the dowers; this was done doubtlessly at the suggestion of the trustees, who thought that a married woman's bond was worthless unless signed by the husband. There is no evidence to show that even Rebecca C. Meyers knew of her husband signing the bond.

Rebecca C. Meyers immediately after the sale took possession of the property and made thereon valuable improvements, all of which was paid out of her separate estate or by rents received from the property.

The scrivener who prepared the deed did not fill in the Christian name of the purchaser, as there must have been some doubt in his mind to whom the deed was to be made, the husband or wife, leaving that to be done by the trustee. This was done by William H. Ruppel, Esq., who was then teaching school at Berlin, and the deed was delivered to Rebecca C. Meyers with her name on it.

Emanuel J. Meyers did not assert the property was his, or borrow money from the plaintiff in error on his credit.

On the 27th of March, 1877, Rebecca C. Meyers had her deed recorded, and she swears she then put it on record because a neighbor's house had burned, and she became alarmed for fear her deed might burn up.

At the time of the trial of the first ejectment her deed was lost; but at this trial it was found and produced. The verdict was for the plaintiff below and defendant in error.

December 30, 1882. TRUNKEY. The plaintiff alleges that at her suggestion her husband purchased land for her, and that

she furnished the money for all the payments that were made. For the present this question is settled by the verdict. The testimony touching it was submitted under fitting instructions, the pith of which was, "she must show that the property was bought for her; that she had the means to buy with, and that she applied those means in payment of the purchase-money. And this she must show by evidence at once clear and so full and satisfactory that the jury can rely on it with reasonable certainty." Taking her allegation as true, the title vested in her by a resulting trust, even if the deed was made to her husband. The owner of land is not estopped from setting up his title against judgment creditors, though they had no actual or constructive notice of his title at the time they gave credit or filed the judgment against the occupant. A married woman is not bound to record her deed under pain of losing her land if seized by her husband's creditors. The defendants' third, eighth and tenth points were rightly refused.

Nor is there error in the answer to the fifth point, for it adapted the proposition to the evidence before the jury.— The court was not bound to affirm or deny the proposition that, if the wife purchase land and pays for it with her own money, and has the deed made to her husband, there is no resulting trust. It did not arise upon the evidence. And the learned judge may have believed that husband and wife are unequal in power and influence over each other, and that when he claims her property has been vested in him it ought to appear in the circumstances that it was done without undue influence upon his part.

Nothing on the face of the deed authorized its rejection as evidence. If it was not all written by the same hand, in the absence of erasure or interlineation the presumption is that it was all written before sealing. The burden was on the defendants to show that the alleged alteration was subsequent to delivery of the deed. If the record of the Orphans' Court failed to show authority in the trustees to make the deed to Rebecca C. Meyers, and for that reason it did not operate as a conveyance to her, it was pertinent testimony, with other testimony, to establish the alleged resulting trust. There is no evidence that the deed appears to have been altered, or that the signatures were forged; but there is testimony that the signatures are genuine, and no appearance of erasure on the face of the deed. The testimony of Dennis Meyers by no means warrants submission to the jury to find that any word had been taken out and others inserted instead.— The seventh, eleventh, twelfth, thirteenth and fourteenth assignments are not sustained.

It was competent to prove that E. J. Meyers bought the property for his wife, and the testimony constituting the fifth and sixth assignments goes no further.— It was confined to the request of the wife to purchase, and to his statement made immediately after the sale that he had purchased for her.

Evidence of the declaration of a party in possession in some circumstances, is admissable in his own behalf to show how he claimed, or the extent of his claim, but not to show that he had paid for the property or that it had been vested in him by deed or otherwise. The offer set out in the eighth assignment was to prove possession and claim of ownership of the property; but testimony was afterwards received that the plaintiff said her money paid for it. In the argument this was treated as if received under the offer, for which reason we note the assignment. The evidence of her declaration respecting payment of money is not within the exception.

It was material for the plaintiff to establish the fact that she had money to make the payment for the property in addition to the sums she had loaned. After

Charles Shank had testified that the plaintiff's father came to her house the evening before Christmas, and "handed over to her, a Christmas gift—a roll of something —looked like a roll of money," he was allowed to say that, on the next morning, she said "the Christmas gift her father gave her was $500. No authority has been cited which allows a party to make out a case in that way. Were it permitted a party to prove such declarations he could readily prepare a multitude of witnesses. We are of opinion that it was error to admit the testimony set out in the ninth assignment, and for that the judgment must be reversed.

The only remaining assignment that will be remarked is the tenth. It does not appear by the record, as printed that the defendants objected to the trial or taking the verdict because of the non-joinder of the plaintiff's husband. Section 39 of the Act of 1850, P. L., 571, provides, that for recovery of any property secured to a married woman by the Act of 1848, suit may be brought in the name of herself and her husband, to her use; and section 2 of the Act of 1856, P. L., 315, enables her to bring suit alone if her husband has deserted or separates himself from her, or neglected or refused to support her, or she had been divorced from his bed and board. Had the defendants objected, doubtless the court would have heard them. The plaintiff had a right to move to, amend, and still has that right, and would be allowed to do so in this court, under the circumstances, if the cause were not reversed on another ground.

Judgment reversed and venire facias de novo awarded.

COMMON PLEAS.

C. P. of Philadelphia Co.

Furbush v. Fisher.

A landlord, under a claim for rent, can hold possession of personal property previously sold by the tenant, demanded by the purchaser, but not delivered, and remaining on the premises, even though an actual formal distress had not been made.

Sur rule for a new trial.

This was an action of replevin for a spinning machine. Plaintiff had purchased it from one member of the firm of Chappel & Taylor, who were the defendant's tenants of a mill, and received a bill of sale for the same.

Plaintiff went to the mill to get the machine, but, finding it closed, called upon the defendant, the landlord. Defendant told plaintiff that rent was owing, and he would not let the machine go—that he held it for the rent.

Taylor, of the firm of Chappel & Taylor, the tenants, then handed the defendant the key of the premises. Before the defendant could get a constable to make formal distress, this replevin issued, and plaintiff took away the machine. Under the evidence the judge trying the cause instructed the jury to find in favor of the defendant, the landlord, for the rent in arrears.

July 14th, 1883. ELCOCK, J.—The question is, whether a landlord, under a claim for rent, can hold possession of personal property previously sold by the tenant, demanded by the purchaser, but not delivered, and remaining on the premises, unless actual formal distress was made.

Distress is the right to take property for payment of rent, and is so ancient a remedy that its origin has never been traced. Our Acts of Assembly on this subject do not define it, and merely extend the common law remedy in the cases specified therein, and define a mode of procedure after distress made. The goods of a stranger on the demised premises are alike liable to distress, save those on storage in the way of trade. When the plaintiff made demand for the personal property in this case the landlord replied that he held it for rent, and would not let it be delivered. Was this the commencement of a distress? In Wood *v.* Nutt, 5 Bingham 10, a landlord to whom rent was in arrear, hearing his tenant and a stranger disputing about the property of

an article on the premises early in the morning, entered and said: "The article shall not be removed till my rent is paid." The stranger, nevertheless, removed the article. On the same day, after the removal, the landlord sent his broker to distrain for the rent.

Held, that the distress was sufficiently commenced by the landlord to entitle him to the article in question. Chief Justice Cockburn, in Cramer *v.* Mott, L. R. 5 Q. B. 357, says: "there need not be an actual seizure to create a distress; it is enough that the landlord or his agent takes effectual means to prevent the removal of the article from off the premises on the ground of rent being in arrear; and he does this when he declares that the article shall not be removed until the rent is paid."

The same doctrine has been held in Hutchings v. Scott, 2 M. & W. 809, and Swann v. Falmouth, 8 B. & C. 456, and are cited as authority by Taylor's Landlord and Tenant, § 578. The question has not been authoritatively determined in Pennsylvania, but as the common law right of distress is what exists here, the authorities cited would appear to govern the case. No question was raised but what the article was distrainable, for it was put in the demised premises by the tenant for trade purposes, and was merely fastened to the floor by wooden screws.

If it were part of the realty the plaintiff would have no remedy, because he could not replevin it: Roberts v. Dauphin Bank, 7 H. 71; Overton v. Williston, 7 C. 155.

We see no error in the binding instruction given to the jury on the trial, and the rule for a new trial is discharged.

C. P. of Luzurne County.

Swallow v. Red Ash Coal Co.

It is misconduct on the part of a magistrate to omit to inform a party who has given bail for an appeal, and paid the costs, that an affidavit is also required to perfect the appeal.

Rule to strike off appeal, etc.

June 24, 1883. WOODWARD, J.—On the 14th of May, 1883, an order was made by Judge Rice that the rule in this case, stood over until the next argument court, with leave to the defendants in the meantime to take depositions. The purpose of this was to ascertain whether the omission of the defendants to file the proper affidavit for an appeal was caused by the fault, fraud, or misconduct of the magistrate, and whether the defendants were or were not themselves guilty of *laches*.

The deposition of J. C. Williamson has been taken. It shows that after calling at the alderman's office during business hours for the purpose of taking an appeal, and finding it locked, he met the alderman in the court house. They went together to the bar office, where the alderman made out a bill of costs, which Williamson paid. Bail was given for the appeal, and the transcript was afterwards forwarded by the magistrate by mail. Mr. Williamson states that nothing whatever was said to him about an affidavit, and that he was prepared to make one if he had known that the law required it.

The alderman is careful to state in his transcript that the defendants failed to file the required affidavit. This fact is important as showing, first, that the alderman knew that an affidavit was necessary; and secondly, that he failed in his duty in accepting payment of the costs and taking bail for the appeal without apprising Mr. Williamson of the further requirements of the law. This was misconduct on the part of the magistrate, by which the defendants were deceived and misled.

The rule to strike off the appeal is discharged, and it is now directed that the defendants have twenty days in which to perfect their appeal according to law.

Will—Construction of—Testatrix was a widow with three young children. One of the provisions of her will was as follows: "I wish my aunt to take charge of my children, and to receive annually from my estate for her services $500." *Held*, that on the youngest child attaining its majority the payment of the $500 ceased. —*Hewson & Emlen's Appeal*, 40 Legal Intelligencer, 288.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, AUGUST 2, 1883. No. 22

COMMON PLEAS.

York Water Company v. Glatfelter.

Change of Venue—Court Interested—Local prejudice.

Plaintiff filed a bill against defendant, alleging that the defendant had erected a paper mill on the Codorus creek, and had caused noxious substances to flow from said mill and thereby rendered the water unfit for domestic use. Defendant in his answer denied the charge. Defendant filed his petition for a change of venue, alleging that the Court, (or any member of the bar who might be appointed Master or Examiner), was interested in the question to be determined in the suit, being water renters. HELD, not to be sufficient grounds for a change of venue.

The question in issue is purely one of fact, and is so abstract in its character that it cannot give rise to any bias or prejudice whatsoever.

The defendant amended his application, and setting forth the list of stockholders of the plaintiff company alleged that a large number of the inhabitants of the county had interest in the question involved therein adverse to to the defendant. HELD, That the mere fact that these individuals were stockholders of the plaintiff company is not evidence of the fact that they have an interest in the question involved adverse to the defendant.

The interest that the stockholders might have by the benefit accruing from pure water, is one that can only arise after it is ascertained that the defendant caused the impurity of the water which is the subject of complaint.

Motion for change of venue.

The grounds for the motion are given in the Court's opinion.

The case was argued before Judges Wickes and Gibson, and the opinions below are signed by both judges.

V. K. Keesey, for motion.

Jas. W. Latimer, contra.

July 30, 1883. GIBSON, A. L. J.—The first section of the act of 30 March, 1875, P. L. 35, provides for a change of venue, in any civil cause in law or equity, "whenever the judge who by law is required to try or hear the same, shall be personally interested in the event of such cause or in the question to be determined thereby."

The bill in this case sets out, that in pursuance of a supplement to its charter, the plaintiff, a water company, brought into the borough of York an addittional supply of water from the Codorus creek, by means of expensive machinery, in the year 1850. That the water was then pure. But that defendant has since erected a paper mill on said creek, above the plaintiff's works, and has caused noxious substances to flow from the said mill, and the water, where the pumps of the plaintiff are worked, is polluted and rendered unfit for domestic use or drinking, and alleging irreparable injury and praying for an injunction.

The answer of the defendant denies that he caused noxious substances to flow into the water of the Codorus creek, whereby, at the place where the pumping works of the plaintiff are located, it is polluted and rendered unfit for domestic use or drinking. This is the substance of the charge in the bill and of the denial in the answer.

The defendant has filed a petition, under the above-mentioned act, praying for a change of venue, alleging that any member of the York Bar, who might be appointed either examiner or master, and the members of the Court, are interested in the question to be determined in the suit. The ground upon which this application is based, is, that as the judges of this court use the water furnished by the plaintiff company, and are renters of the same, they are, therefore, personally interested in the question to be determined by this suit. That question is, whether or not the defendant has caused noxious substances to flow from his paper mill, by which, the water, where the plaintiff's pumps are worked, is polluted and rendered unfit for domestic use or drinking?

This case might present a different aspect, if it was an ascertained and admitted fact that the pollution of the water complained of, was caused by the refuse flow from the defendant's paper mill, and he justified it by claiming a right to such use of the stream. But he denies the allegations of the bill and sets out other causes, in his answer, which may account for the impurity of the water. It becomes, therefore, a matter of judicial investigation whether the matters alleged in the bill are the cause of the pollution of the water supplied by the plaintiff to those who use it, or whether there are other causes. Unless the refuse flow from the

defendant's paper mill is the cause of the impurity of the water there can be no advantage gained by the water company or renters, by this suit going against the defendant. The water might still be impure from other causes. Unlike a decree based upon probabilities, or the mere findings of testimony, relief here must depend upon the actual fact.

The old law, relating to special courts, provided for the same, when the judge should be personally interested in the event of a suit. A distinction as to being interested in the event of a suit and being interested in the question had been made in reference to witnesses. So, in the act now in view, the legislature has provided for a change of venue where the judge is personally interested in the question to be determined by a suit. But to hold that a question like the one involved here, is within the provision of the act of 1875, would send away a large number of cases which could not have been in the contemplation of the legislature. Almost all causes of a general public interest would have to be tried out of their proper venue —causes relating to county and municipal affairs, matters relating to taxes, the public comfort, nuisances and the like. The interest contemplated must be a personal interest, as indeed the act says. But the question here arises on an issue of fact only, so abstract in its character that it cannot give rise to any bias or prejudice whatever. Is the fact so, or not?

These reasons also apply to the other provision of the act of 1875, invoked in support of this application. There is no just ground for presuming local prejudice, or any interest adverse to the applicant, or that a fair and impartial trial cannot be had here of the question.

Motion overruled.

[The above opinion was read in Court on May 12, 1883, but the defendant's counsel filed an amendment to his application, whereupon it was withheld, and afterwards filed with the following:]

July 30, 1883. GIBSON, A.L.J.—After the foregoing opinion was delivered in open Court, the defendant, by his counsel, moved to amend his application, in order to present reasons for a change of venue under the fifth clause of Section I, of the Act of March 2, 1875. The amendment was filed, setting forth specifically the number of stockholders, individual and aggregate, of the plaintiff corporation, the number of shares held, the par value of the stock and its market value. The Court have carefully reconsidered the application in this point of view.

It will be observed that the said fifth clause does not only provide that: "Whenever a large number of the inhabitants, &c., have an interest in the question involved therein," but it further says, an interest "adverse to the applicant." According to the provisions of the second section of the act, the Court must be "satisfied of the truth of the facts alleged." That is, in this instance, of an interest, adverse to the defendant, or of such facts as lead satisfactorily to that conclusion. This the Court must be satisfied of, before the oath of the applicant can avail to show that he believes he cannot have a fair and impartial trial.

That a large number of the inhabitants of the Borough of York are stockholders of the York Water Company, is not evidential of the fact that they have an interest in the question involved in this cause adverse to the defendant. The value of stock, so far as it appears in the amended application, is not impaired by anything involved in the cause. Nor is it alleged that it will be depreciated or enhanced in value by the issue of the cause either way. The only plausible ground for averring any interest whatever in the question is, that if, after investigation, the defendant is found to be the source of the alleged annoyance, there would be benefit accruing to the company and the public by having the nuisance removed. But that interest can only arise after it is as-

certained that defendant causes the impurity of the water which is the subject of complaint.

The question is not whether that is a nuisance or not, but whether the defendant is the cause of it? The bill prays for an injunction, which can only be granted on clear proof: Bright. Juris. Sec. 305

Therefore as regards the question involved in this suit we do not perceive any interest in the stockholders, or in a large number of the inhabitants of the county, adverse to the defendant.

Motion overruled.

C. P. of Luzurne County.

Fidelity and Casualty Co. v. Hesty.

The act of April 4, 1873, in regard to foreign insurance companies, does not enlarge the jurisdiction of justices of the peace so as to permit them to direct process to a constable of another county.

The acts of April 24, 1857, and of April 8, 1868, refer to actions commenced in courts of record only.

Certiorari.

June 23, 1883. WOODWARD, J. The summons in this case was issued by an alderman of the city of Wilkes-Barre, and directed to the constable of Reading, Berks county, Pennsylvania. It was returned served by such constable, "on the within named defendant, the 7th of March, 1883, personally, by producing to Geo. P. Zeiber, Esq., state attorney or agent for The Fidelity and Casualty Company of New York, the original, and informing him of the contents thereof."

It is claimed that this method of obtaining service of a summons upon a foreign insurance company, doing business in this State, is warranted by the thirteenth section of the act of April 4, 1873, (Purd. 1798, *pl.* 22.) The act of March 20, 1810, (Purd. 850, *pl.* 40), defines the powers of justices of the peace in civil causes, and directs that process shall issue to the constable of the township, ward or district where the defendant usually resides, or can be found, or to the next constable most convenient to the defendant. It is the universal practice however, for justices to issue their precepts to any constable of the county. It does not seem to us that the act of April 4, 1873, was intended to so enlarge the jurisdiction of justices as to permit them to direct process to a constable of another county. The acts of April 24, 1857, (Purd. 802), and of April 8, 1868, (P. L. 70), prescribe the method of serving process upon insurance companies of other States, doing business in this State, but both these acts, in our opinion, refer to actions commenced in courts of record, and not to those before justices of the peace. See Clark *v.* Wooley, 7 S. & R. 352.

The first and second exceptions are sustained, and the proceedings are reversed.

C. P. of Luzurne County.

Ziegler v. Everhart.

Watching timber at a salary of fifty dollars per annum is not the kind of "manual labor," nor the salary such "wages of labor," as are contemplated by the act of Assembly requiring an affidavit and bail absolute for appeals.

Rule to strike off appeal.

May 15, 1882. WOODWARD, J.—It has not been made clear to us that the claim of the plaintiff in this case was for what is known as the "wages of labor." The first section of the act of April 9, 1872, (Purd. 1464, pl. 1) describes the class of persons whose earnings are to be protected. These are miners, mechanics, laborers, clerks, etc. The act of April 20, 1876, in its first section, provides the method of appeal from the judgments of justices of the peaces for the wages of "manual labor." The transcript in this case shows that the claim was for work and labor done, and the depositions explain that the service consisted in watching timber for six years at fifty dollars per year. We do not think that such a claim comes within the spirit and meaning of the act of Assembly requiring an affidavit and bail absolute. The rule to strike off the appeal is discharged.

QUARTER SESSIONS.

Commonwealth v. Gallagher.

Q. S. of Lackawanna County.

In case of assault and battery, where the defendant died after the Grand Jury had returned a true bill against him and before the trial was had, the county cannot be compelled to pay the costs of prosecution.

Motion for an order for county to pay costs.

HANDLEY, P.J.—John Scanion presented his bill of indictment against James Gallagher, charging him with assault and battery. The Grand Jury returned a true bill but before the case was called for trial, the Great Judge called Gallagher before him for hearing on final appeal. He has not thus far returned from the Court above, and the law permits us to presume that he never will again return to answer any charge that may be preferred against him here. The prosecutor, therefore, desires that an order be made directing the County Commissioners to pay the costs of prosecution. Can we make such an order? We think not. We have examined all of our statutes on costs, and we can gather nothing out of the mouth of these statutes that provides, when a man is called to his final rest, and is bid to sleep the eternal sleep of man, that the county shall pay the costs. Gallagher cannot be made to pay them until a jury of his country first say that he must. It will be exceedingly hard to find a jury to agree on that point now, and we are therefore clear that the county may not, or his estate, be forced to pay them *pro hac vice*.

Motion and order refused.

Judge Rhone's New Work.

ACTS OF ASSEMBLY AND FORMS RELATING TO ORPHANS' COURT PRACTICE, &C. By Hon. D. L. Rhone, Judge of the Orphans' Court of Luzurne County. VOL. II. REES WELSH & CO., Publishers, Philadelphia, Pa.

The second volume of Judge Rhone's excellent work on Orphans' Court practice is devoted to the Acts of Assembly relating thereto and the proper forms used in such practice. These acts are arranged under appropriate headings, and the Acts embraced in the codes of 1832, '33, '34 and 53 have the reports of the Commissioners who prepared these codes annexed as foot notes to the text. Following the Acts come the forms. Thus, the heading is "Account" under which the Acts of Assembly relating to the filing of accounts, their examination by the Register, advertising, confirmation or reference to Auditors, recording and the filing of transcript, in the Common Pleas, are given in thirteen sections. These are followed by twenty-three forms of accounts, confirmation of account, exceptions, advertisements, transcripts of balances, petition for citation, citation, answer, and attachment.

From this it will be seen that the book is full and complete, nothing being omitted, while the various subjects are so distinctly arranged under their appropriate headings that there is no trouble in finding just what you want. The table of Contents and the General Index to both volumes is an elaborate piece of work, and the stores of information contained in the volumes are opened to the slightest search.

Judge Rhone deserves the thanks of the profession for his very able work. It fills a long felt want, and fills it so admirably that the most chronic grumbler can not find any fault therewith. The book is a necessity to every practicing Attorney, to every Registry, Clerk of the Orphans' Court, or any one having anything to do with the settlement of decedent's estates.

The typograhpical work is fully up to Rees Welsh & Co.'s high standard, and the book presents a handsome appearance.

Price for 1st Volume (see notice in previous issue of the RECORD) $6.00; for 2d Volume, $6.00.

When two young lovers happen to sit down at the same moment on two tacks, the immediate result is a social hop.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, AUGUST 9, 1883. No. 23

QUARTER SESSIONS.

Q. S. of Lebanon County

Commonwealth v. Trout.

A resident of the Commonwealth in confinement for costs alone, under sentence of a criminal court, is entitled to be set at liberty forthwith upon making application for the benefit of the insolvent law, and presenting a bond in accordance therewith.

Motion for leave to issue *capias*.

February, 1883. MCPHERSON, J. At January sessions, 1883, John Trout was acquitted of the charge of selling liquor without a license, but directed by the jury to pay one-half the costs. On January 9th he was sentenced, and on January 15th, having made application for the benefit of the insolvent laws, and presented a bond as thereby required he was discharged from custody. The district attorney now asks for a *capias*, alleging that the order for his discharge was illegal, and that he must be considered as an escaped prisoner. The argument is, that a sentence for costs requires either payment, imprisonment for thirty days under section 48 of the insolvent law of 1836, after which the prisoner is discharged without further proceedings of any kind, or imprisonment for three months if a discharge is sought as an insolvent. Confinement for three months is made necessary, it is said, by section 3 of the act of 1836, which provides that "no debtor shall be entitled to relief under this act, unless he shall have resided within this Commonwealth for six months immediately preceding his application to the court, or shall have been confined in jail for three months immediately preceding such application." A careful examination of the various statutes and decisions on this subject has led us to a different conclusion, the reason for which we will state as briefly as possible.

At common law, as is well known, no provision was made for costs in any form of proceeding, civil or criminal. In Irwin *v.* Commissioners, 1 S. & R. 508, Judge Yeates declares that before the passage of the act of December 8, 1804, empowering grand and petit jurors to dispose of the costs in certain cases, "the defendant, whether convicted or acquitted of the offence charged, was obliged to pay the costs, and left to his remedy against the prosecutor by action of malicious prosecution. If he was convicted, the payment of costs formed part of the sentence; if acquitted, he was discharged on payment of fees." There had been earlier legislation, viz.: the acts of September 33, 1791, and of March 20, 1797, Read's Dig. 287, pl. 25, and 293, pl. 51, but the act of 1804, Sm. Law, 204, first gave juries power over the subject. See also Commonwealth *v.* Tilghman, 4 S. & R. 127; Strein *v.* Zeigler, 1 W. & S. 260; Commonwealth *v.* Johnson, 5 S. & R. 199; McKinney's Am. Mag. 316, 319, *et seq.*— The criminal procedure act of 1860 re-enacted the former statutes, and the act of 1804, with its supplements, is substantially the law to-day. Where the defendant was confined for costs, under either the common law or this legislation, he could originally only be released upon payment. The insolvent law of April 4, 1798, Read's Dig. 176, did not touch the subject at all, and it was not until 1814, by section 17 of the act of March 26, that persons "in confinement . . for the payment of the costs of prosecution" became entitled to relief under the acts relating to insolvent debtor. A similar provision appears in section 47 of the act of June 16, 1836, P. L. 729. At what time, then, is an insolvent debtor entitled to his discharge from confinement? The act of 1798 provided, in section 1, that "any debtor having been an inhabitant of this State for two years next before his application" might apply to the court in term time; and in section 2, that he should be discharged from imprisonment only after assigning all his property. This compelled him to remain in jail while notice of his application was

being given or published, and until after final hearing. If, however, he was arrested in vacation, he might, by section 14, be discharged, "forthwith" upon application to a judge, and giving bond to the plaintiff to appear at the next term and comply with the requirements of the statute.—This act expired in 1801. The first section of the act of March 26, 1814, made six months' residence in the State sufficient. and the second section provided for the debtor's discharge from confinement only after final hearing. No provision was made for arrests in vacation, and neither statute extended to non-residents. To remedy this latter defect, the act of March 13, 1815, P. L. 156, was passed, allowing "all and every person or persons" to apply, but provided that those who had not been residents of the State for six months must first suffer confinement for three months. Liberty, pending the proceedings, was given in 1820 to certain debtors, but persons confined for costs could not be released until final hearing. Henry *v.* Commonwealth, 3 Watts 384. The revised act of 1836, in section 3, provides that the debtor must have "resided within the Commonwealth for six months immediately proceeding his application to the court, *or* shall have been confined in jail for three months immediately preceding such application," plainly intending to consolidate the provisions of the acts of 1814 and 1815. The language of section 1, also referring to "insolvent debtors residing *or being* within this Commonwealth," shows that the act was meant for residents and non-residents alike. As to non-residents, confinement for three months is necessary before an application can be made; but the case of residents it seems clear, from sections 4, 5 and 6, that the debtor is entitled to discharge "forthwith" upon giving bond to appear at the next term and present his petition for the benefit of the law. It is not even necessary to apply to the court or a judge; the prothonotary, under the act of March 30, 1833, P. L. 107, may approve the security and make the order to discharge. This is the case of a debtor, and section 47 seems to us quite as explicit with regard to "any person confined for non-payment of . . . the costs of prosecution." The language is that the "Court of Common Pleas . . shall have power to discharge such person from such confinement on his making application and conforming to the provisions hereinbefore directed in the case of insolvent debtors." This is very different from section 16 of the act of 1814, which only gave to such persons the "benefit of this act," under which, as we have seen, even a debtor could not be released until after final hearing, and shows plainly, as we think, that the intention of the Legislature was to remedy the inequality pointed out in Henry *v.* Com'lth, *supra*, decided in 1834, and put persons imprisoned only for costs on precisely the same footing as debtors. But, however, this may be, section 6 of the act of January 24, 1849, P. L. 677, seems to remove all doubt by providing that "any applicant for the benefit of the insolvent laws, who is, or may hereafter be, in confinement under sentence of any criminal court, and who shall be entitled to be released from such confinement on compliance with the provisions of existing acts of Assembly, shall be released on giving bond as in civil cases."

The Commonwealth's whole case rests, therefore, on the construction of section 3, for which it contends; and this construction, besides being at variance with the apparent meaning of the words used, and with the history of former legislation on the subject, further loses probability when section 48 is considered. Under that section, which is taken from section 18 of the act of 1814, as construed in Commonwealth *v.* Long, 5 Binn. 489, imprisonment for thirty days entitles a person in confinement for costs to his discharge without proceedings of any kind. It is conceivable, with such a provision in

the law, that the Legislature meant, in 1836, also to say that such prisoners might apply for discharge under the formalities of the insolvent law if they would stay in jail two months after they were entitled to be free, and particularly when the consequences of discharge are the same in either case, viz., freedom from imprisonment for the same cause, but not freedom from the debt or charge?

We think the provisions of the law, so far as fines and costs are concerned, may be summarized as follows:

1. A person sentenced to pay a fine not exceeding $15, or to pay such a fine and costs, or to pay costs alone, is entitled to release after a confinement of thirty days.

2. A person sentenced to pay a fine more than $15 with or without costs, can only be released under the insolvent law, and cannot make application until he has been in confinement for three months.

3. One who has been a resident of the State for six months immediately preceding his application, and who has been sentenced to pay costs alone, may be discharged forthwith upon making application under the law.

Trout comes within this latter class, and was, therefore, properly discharged.

The case of *Ex parte* Woods, 1 Pitts. 17, in which a different conclusion is reached, does not bind us, and the reasoning is not convincing. The case of *Ex parte* Feehan, Brightly, 462, is not in point, for the prisoner there had been convicted and sentenced to pay a *fine*, and he was clearly within the proviso to section 47, which declares that "where such person shall have been sentenced to the payment of a fine; . . he shall not be entitled to make such application until he shall have been in actual confinement, in pursuance of such sentence, for a period not less than three months." These two cases are briefly mentioned in Schuylkill County *v.* Reifsnyder, 10 Wr. 450, but the question here considered was not before the court, and we have not been able to find any authority on the subject.

We have gone further than the precise question involved, because there seems to be a diversity of practice under the act, and we hope the county of Lebanon, which has a considerable interest in the matter, will take measures to bring it in some way before the Supreme Court, and have it definitely settled.

The *capias* is refused.

SUPREME COURT.

Swartz v. Hauser.

Bailment—Bailees for Hire—Gratuitous Bailees—Negligence, gross and slight—Misdirection where it does not prejudice a party not a ground for reversal.

A. sent to B., a lard dealer and negotiator of loans, with whom he had been in the habit of transacting business, a certificate of stock with instructions to sell when the stock should touch a certain price. No agreement was made as to B 's receiving any compensation for his services. B., finding that the stock was rising, deposited it with C., a stock-broker, with instructions similar to those he had received from A. C., in turn, sent it D., another stock-broker, with like instructions. Subsequently C. failed, and D. sold out all the securities deposited by him, including the one in question, to cover C.'s indebtedness to D.—In an action afterwards brought by A. against B. to recover the value of the certificate, the Court left it to the jury to say whether B. was a bailee for hire, or a gratuitous bailee, instructed them that in the former case he was liable for slight negligence and in the latter for gross negligence only, and left it to them to say in either event whether B. had been guilty of the sort of negligence for which he would be liable. HELD, a verdict having been found for A., that it was error to leave it to the jury to say whether B. was a bailee for hire or not, as the law would imply that he had contracted for compensation for his services, but that this error having done B. no harm, constituted no ground for reversal.

HELD further, that the question of B.'s negligence was properly submitted to the jury.

Error to the Common Pleas of Lancaster county.

Assumpsit, by Henry C. Hauser against David G. Swartz, for the value of twenty shares of the capital stock of the Central Transportation Company.

Upon the trial, before PATTERSON, J., the following facts appeared:

On August 4, 1872, the plaintiff, a resident of York county, sent to the defendant, who resided in the city of Lancaster, a certificate for twenty shares of said stock standing in the name of plaintiff with a power of attorney in blank signed by the plaintiff, with instructions to sell

the stock as soon as the market price reached $50 per share. The plaintiff had been in the habit of dealing with the defendant, whose business was that of buying and selling Western lands and negotiating loans in the West. Nothing was said by the plaintiff in his letter, or was there any evidence of any subsequent agreement between the parties as to what compensation, if any, the defendant should receive for his services. At this time the market price of the stock was about $46 per share. A few weeks later the price beginning to rise, the defendant took the certificate to the banking house of J. B. Long, in Lancaster, who transacted a business of buying and selling stocks, with whom Swartz was in the habit of dealing, and requested him to sell it as soon as it would bring $50 per share. The defendant testified that he told Mr. Long it was on Hause's account. The proper market for this stock being in Philadelphia, Mr. Long sent the certificate to Glendenning, Davis & Co., brokers, in Philadelphia, for sale as soon as it would realize $50 per share. In November, 1872, Long failed, and Glendenning, Davis & Co., to whom he was indebted, sold out all the securities which Long had placed in their hands, including the twenty shares of stock belonging to Mr. Hauser. The stock did not, at any time, reach $50 a share. Hauser, on January 4, 1873, called on Swartz, who paid him the dividend then due, and subsequently continued to pay him quarterly dividends until July, 1876, at which time Hauser asked for the stock or its proceeds. Swartz thereupon made the following entry in Hauser's pass-book :— "On Aug. 4, 1872, I handed to J. B. Long, broker, at Lancaster, twenty (20) shares Central Transportation Co. stock to sell, limit $50 per share, the said stock having been sent to me by H. C. Hauser, to sell for his account, and I took said Long's receipt. D. G. SWARTZ." Swartz paid no further dividend upon the stock, and the plaintiff brought this suit June 18, 1878.

The defendant presented, *inter alia*, the following points : (1) "The undisputed evidence in this case shows that the defendant was voluntary bailee without reward ; he is therefore responsible only for gross negligence." *Answer.* "If the jury find that the defendant was a voluntary bailee without reward, then he is only responsible for gross negligence." (2) "There is no evidence in the case of gross negligence on the part of the defendant, and therefore the verdict must be for the defendant." *Answer.* "The evidence is for the jury. If they find there is no gross negligence on the part of the defendant, and that defendant was a voluntary bailee without hire, then the verdict must be for the defendant."

The Court in the general charge said, *inter alia*, "Is there any evidence that defendant contracted for or received any compensation or reward for anything he did in and about the selling or disposal of this stock sent to him? We have not been able to perceive any, but that is a question of fact for you. * * * The Court gives you the law on this point, because as the Court comprehends the law of this case it is a case of bailment, and the main inquiry for you is—What is the duty and what is the responsibility of the bailee, Mr. Swartz? Did he do or order anything respecting those twenty shares of stock that a man of common sense under the circumstances would not do with his own stock? * * * If you find that the defendant, Mr. Swartz, was a bailee for hire, in that case the bailee is required to exercise great care, and is responsible for slight negligence. The Court has been unable to see that any hire was paid to the bailee, yet that is a question for you to decide on the evidence.— If the evidence so satisfies you, and if you find he was bailee for hire, and if the loss was occasioned by negligence on his part, he would be liable to the bailor, Mr. Hauser, for the loss.

Verdict and judgment for the plaintiff for $871.36. The defendant took this writ, assigning for error, *inter alia*, the answers to his points, and the portions of the charge above quoted.

May 16, 1881. THE COURT. It certainly would have been manifest error in the learned judge to submit any question to the jury of which there was no evidence. He thought there was no evidence that defendant below had contracted for compensation for his services, yet he submitted it as a question of fact. But this did the plaintiff no harm. There was no direct evidence, perhaps, of a contract to pay, but the law implied one in the absence of an express contract not to pay.— We see nothing in any of the errors assigned of which the plaintiff has any right to complain.

Judgment affirmed. PER CURIAM.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, AUGUST 16, 1883. No. 24

COMMON PLEAS.

C. P. of Luzurne County.

Klinetob v. Roth.

In an action before a justice, the plaintiff's demand was for "five dollars and twenty-five cents damages, by reason of defendant's not repairing plaintiff's gun as by him agreed to do, and receiving pay for it:" HELD, that the justice had jurisdiction.

Rule to show cause why affirmance of proceedings entered November 9, 1875, shall not be stricken off, and the case reinstated for argument.

March 6, 1882. RICE, P. J. On the 7th of April, 1875, exceptions were filed to this record, and on the 9th of November following the proceedings were affirmed. May 18, 1876, this rule was granted. It is in the nature of an application for a reargument, upon the ground that the court erred in affirming the proceedings. The sole reason urged before us was, that the justice did not have jurisdiction of the case of action.

It is asserted by the defendant's counsel that this matter was decided by the judge who granted the rule. This, however, is denied by the counsel for the plaintiff. In such a dispute we must necessarily rely entirely upon the record, and as the record shows no previous disposition of the rule, we must assume that the question has not been finally adjudicated.

The cause of action, of which the justice took jurisdiction, is thus stated in the transcript: "Plaintiff demands five dollars and twenty-five cents damages, by reason of defendant's not repairing plaintiff's gun as by him agreed to do, and receiving pay for it."

It is assumed by the defendant's counsel that the gist of the action, as thus stated in the transcript, was the failure to repair the gun in a workmanly manner; that this was a tort, and that a justice of the peace had no jurisdiction of such a cause of action, though it indirectly arose out of a contract. It was clearly decided in Zell *v.* Arnold, (2 P. & W. 292) that an action to recover damages for negligence in the execution of work, employment, trust, or duty, under a contract, is not cognizable before a justice of the peace. In the later case of Conn *v.* Stump, (7 C. 14) the plaintiff, on appeal, charged in his declaration that he "retained and employed" the defendant to iron his wagon, and the defendant "undertook and promised to do it with care and skill," and the breach assigned was, that "not regarding his promise and undertaking," he did not do it with proper care and skill. The court below, acting on the authority of Zell *v.* Arnold, dismissed the case for want of jurisdiction in the justice. This was held to have been an error. It is certainly not easy to reconcile these two cases, nor, as we read this record, it is necessary to attempt to do so. The cause of action here set forth is not that the defendant failed to perform the work undertaken in a workmanly manner, but a failure to perform as he had agreed to do, and of this the justice had jurisdiction, as is shown by abundant authority. In the case of Hunt *v.* Wynn (6 W. 47), and action, against a common carrier for not delivering goods intrusted to him, the declaration, on appeal, charged the defendant with negligence, and in a second count, generally, but not having delivered the goods according to contract. It was held that the action was within the jurisdiction of the justice. In the case of McCahan *v.* Hirst (7 W. 178), Mr. Justice Kennedy said: "The complaint of the plaintiff below substantially was, that the defendant, having become by contract the bailee of clover seed belonging to the plaintiff, did not take care of and account for it to the latter as he ought to have done. Contract, then, being the foundation of the duty imposed upon the defendant by his having become bailee, it is clear that a breach of duty thereby imposed, which is the real cause of action here, must be regarded as

arising out of contract, and therefore within the jurisdiction of the justice," etc. See, also, Todd *v.* Figley, 7 W. 542; Livingston *v.* Cox, 7 Barr 360; Seitzinger *v.* Steinberger, 2 J. 380-1.

We have no other evidence of the cause of action in this case, than that furnished by the transcript, which shows that the plaintiff's demand was based on the defendant's *non-feasance* of a contract between them, and not on his *misfeasance* in the performance of a duty implied by that contract, and hence the justice had jurisdiction, and there was no error in the affirmance of the proceedings.

The rule is discharged.

SUPREME COURT.

Rice v. Commonwealth, No. 2.

HELD in this case that—

1. The evidence set forth in the opinion was insufficient to go to the jury upon the question of a promise of marriage by the defendant prior to the seduction.
2. The failure of the Commonwealth to call a certain witness commented on.

Error to the Court of Quarter Sessions of Lackawanna county.

April 2, 1883. PAXSON, J.—When this case was here on a former writ of error* we said pointedly that "the mere evidence of his (plaintiff's) attentions was not sufficient to carry the case to the jury." In other words they were not such attentions as would justify a jury in presuming a promise of marriage, or would amount to such corroboration of the prosecutrix as the Act of Assembly requires in cases of seduction. Upon a state of facts in no essential features differing from those of the former trial the learned judge below charged the jury (see the 7th assignment); "but there is evidence of social attention of various kinds, if you believe it. If it is true that this young man did accompany this young lady from church, and waited upon her home, and called at the house of her parents, and there waited upon her now and then for two years, that is such social attention within the meaning of our Supreme Court as would warrant you in finding that fact in the affirmative." The fact to which the learned judge referred was the promise of marriage. He has entirely mistaken our language and meaning. We repeat now what we said then, that the evidence of intentions on the part of the plaintiff to the prosecutrix was not sufficient to submit to the jury upon the question of corroboration. And the jury should be so instructed in the future, if necessary, upon the same or similar state of facts.

But one other matter remains. We said before, with some reluctance, that "we cannot say that it was error to refuse to withdraw the question of seduction from the jury. There was some proof that plaintiff in error admitted the promise to marry." The evidence was exceedingly weak, but as the case had to go back for other reasons we thought best to allow this question to be again submitted to the jury. It has not been strengthened upon a second trial. The mother of the prosecutrix sent for the plaintiff in error after she learned her daughter was in trouble. He came to her house and had an interview with her in the presence of her husband and her daughter. Mrs. Robertson thus relates what occurred:

Q. "What did you say to him (plaintiff), what were the words? A. I told him this was a nice job he had done; I told him he must fulfill his promise and not bring the rest of the family to shame. Cross-examination.—Q. I want you to tell the first thing said, who said it, and the answer? A. He bid good evening with me and said he was sorry for what he had done Q. He told you he was sorry for what he had done? who spoke next? A. Himself. He said he would marry her if I waited two weeks, because he said he owed his sister some money. I told him to fulfill his promise and not bring my family to shame." There is nothing here from which a jury would safely find a previous promise to marry

*See Rice v. Com., 3 YORK LEGAL RECORD 99.

This view is strengthened by what followed. Upon her re-direct examination the same witness related what occurred as follows:

Q. "Tell us what took place at the time Rice came to your house when you sent for him? A. He came to talk to me. Q. What was the first thing said? A. We bid good evening together, and he told me he was sorry for what he had done, and if I would leave it for two weeks he would marry her; I told him I would not leave it two days; I said I had a small family coming up and didn't want to bring them to shame; he said he hadn't money enough to get married now, he owed his sister board. I said he could get married and have her home there, and not bring my little family to shame." Cross-examination. Q. "Then, if I understand it now, it was this way: Rice said he owed some money for board, and could not marry short of two weeks? A. Yes, sir. Q. And then you went on and said he could fulfill his promise, that he would have a home there? A. I said, if he would fulfill his promise and let her come home, as he promised, that her home was there for her, and not bring my family to shame, as I told you before."

As the case now stands it is our duty to express a decided opinion upon this evidence. The implication which might be gathered from the examination-in chief that the plaintiff referred to a previous promise to marry is entirely removed by the cross-examination which shows that the plaintiff was merely expressing a regret for what he had done, and a willingness to repair the wrong by marrying the girl. And when we examine the subsequent re-examination and re-cross examination there cannot be a doubt upon this matter. There is nothing here upon which this verdict can stand. The evidence was at most a *scintilla*, and it will not do to send a man to the penitentiary upon a *scintilla*.

It was said, however, that the case was strengthened by the testimony of Ody Biglin, who stated that he had a conversation with the plaintiff, in which the latter said "he would give two hundred dollars to settle it, and wouldn't give no more; that he was guilty of the crime." It would be straining this language to say the plaintiff referred to the promise of marriage. The crime of which he admitted his guilt was evidently the illicit intercourse. That was not seriously denied, indeed, the plaintiff acknowledged it on a former trial.

There was one feature of the trial below that we cannot pass without comment. It was the failure of the Commonwealth to call the father of the prosecutrix in regard to the conversation we referred to between the mother of the prosecutrix and the plaintiff. The prosecutrix and her father were present at that interview.—Neither was called. It matters little about the prosecutrix, as her evidence in regard to the promise of marriage could not be aided by placing her upon the stand again. But under the circumstances of this case. it was the plain duty of the Commonwealth to have called her father. This was the more necessary by reason of the equivocal character of Mrs. Robertson's testimony, as well as that of her daughter. The Commonwealth demands justice, not victims. This belongs to a class of cases where the whole truth should brought out if possible. Upon so vital a question, as whether, at the interview referred to, the plaintiff admitted a promise of marriage prior to the seduction, the neglect of the Commonwealth to call the father of the girl, who was present at the interview, and heard all that was said, would have justified the jury in drawing an inference seriously unfavorable to the prosecutrix, and the court below would have been at least justified in saying so.

If the plaintiff in error has been guilty of fornication, of which there seems little doubt, he may be convicted of that offence under this bill.

The judgment is reversed, and it is ordered that the record with this opionion setting forth the causes of the reversal, be remanded to the court below for further proceedings.

ORPHANS' COURT.

O. C. of Chester County

John's Estate.

Where the sureties of a trustee are compelled to pay money, owing to the trustee's refusal to do so, they will be subrogated to all the rights of the cestui que trust or a new trustee, against him, and can ask for a decree compelling him to pay to them said sums of money.

Petition by one of two paying sureties to be subrogated.

The facts appear by the opinion of the Court.

January 29, 1883. FUTHEY, P. J. Seneca G. Willauer was appointed by the Court, Aug. 15, 1874, trustee under the will of Jonah John, deceased, of moneys to be held in trust under the provisions of the will of said decedent, and gave as his sureties, Marshall B. Hickman and Wellington Hickman. On Aug. 12, 1880, he asked to be discharged from his trust on account of misfortune and pecuniary losses. The Court, on hearing, appointed Thomas B. Dewees, trustee to succeed him and to receive from him the trust estate, and directed Mr. Willauer to be discharged, upon his paying over to said Dewees the trust moneys in his hands, the amount, according to his petition and account filed and confirmed, being the sum of $11,460.96. The moneys, not being paid over according to the decree of court after demand therefor, the new trustee brought suit against said Willauer and his sureties, Marshall B. Hickman and Wellington Hickman, in the common pleas of Chester County, No. 55, to Oct. Term, 1880, and the said sureties were compelled to pay to him said trust moneys and their interest; each of them paying the sum of $5,974.69. The said Marshall B. Hickman, one of said sureties, then came into this court, by petition, setting out the facts and asked for a rule on said Willauer requiring him to pay to said sureties the amounts which they had thus paid to said Thomas B. Dewees, trustee, and for such other and further relief as to the court might seem proper. The said Willauer filed an answer to a rule granted on said petition requiring him to pay over to said sureties the amounts which they had thus paid, &c., or to show cause, &c., setting out that "by reason of the great depreciation of real estate, and sundry losses and misfortunes in business, he was compelled on March 31, 1880, to make a voluntary assignment for the benefit of creditors; that his estate is badly insolvent, and that he is wholly without money or means wherewith to pay his said sureties, other than such dividend as they have or may receive out of his assigned estate, and further saith not."

It is a well-setted rule, which now admits of no discussion, that, if a surety is compelled to pay moneys for which he is security, he is clothed with all the rights and entitled to all the securities, and is given all the remedies, possessed by the original debtor. (Wright *v.* Grover & Baker, S. M. Co., 1 Nor. 80; Leiter's Appeal, 10 W. N. C. 225, and cases there cited.) In the case before us, the trustee received the moneys of the estate and has filed an account, showing the amount for which he is responsible. These moneys the sureties have been compelled to pay for him. They are entitled to be subrogated to the rights of the new trustee, and to have a decree of court that Mr. Willauer pay the moneys which are in his hands as trustee to them. The prayer of the petition of one of the sureties for an order for such payment to them, and for such relief as to the court may seem proper, is sufficient to move the court to such affection.

It is decreed that Marshall B. Hickman and Wellington Hickman be subrogated to the rights of Thomas B. Dewees, trustee appointed by the court under the will of Jonah John, deceased, and that the said Seneca G. Willauer be and is hereby ordered to pay to the said Marshall B. Hickman and Wellington Hickman, each the sum of $5,974.69, being the respective amounts which the said Marshall B. Hickman and Wellington Hickman have been compelled to pay for him as his sureties as aforesaid.

Hon. Jeremiah S. Black.

DIED.—On the 19th inst., at 2:10 a. m., at Brockie, JEREMIAH S. BLACK, aged 73 years, 7 months and nine days.

A SKETCH OF HIS LIFE.

Jeremiah Sullivan Black was born in the glades of Somerset county, where his grandfather and father had lived, on the 10th of January, 1810. Although of Scotch-Irish descent on one side, a graft of Pennsylvania Dutch on the mother's added a new and valuable fibre to the already vigorous and powerful plant. His father was a farmer, and his early years were, therefore, spent upon the virgin fields of the clearing among the glades, and the lessons of husbandry he there learned were never forgotten.

Jeremiah S. Black matured young. He was a man in mental and physical force while yet a boy in years. He graduated at the age of seventeen, and soon after began studying law, in Somerset, with Chauncey Forward, then a member of Congress. He was admitted to the bar and was Prosecuting Attorney of Somerset County before he was of age. From the moment he began to study law it was observed that he had rightly chosen his profession. He soon developed astonishing legal qualities, and after his admission to practice he rose rapidly. His service as District Attorney was characterized by a vigorous and intelligent discharge of duty that soon cleared the county of criminals.

There was one incentive that kept him up in those trying days. His father had struggled hard to keep the parental estate in his own hands and it was no easy task to get the incumbrances off land not overly productive. It was the dream of young Black's early life to free his father from debt, and while his practice almost everwhelmed him from the start it brought him money to do this, and this fact kept him to the work. In less than three years he paid off the mortgage on the home-farm, lifted all the judgments and made his father comfortable.

When he was twenty-eight years of age he married Miss Mary Forward, his preceptor's daughter, who has shared all the struggles and triumphs of her husband's eventful and useful life.

While Mr. Black's early life was crowded with honors, it was not until he became a Judge that he began to make his mark upon the history of the State.

In 1842 Governor Porter appointed him President Judge of the Court of Common Pleas for the circuit composed of the counties of Franklin, Somerset, Bedford, Blair and Fulton. He was made Chief Justice of the Supreme Court of the State in 1851 by drawing the short term of three years, after having been chosen upon the ticket with Lewis, Gibson, Lowery and Coulter, under the new constitutional provision, making the Judges elective. Years before he became Supreme Judge his fame had spread beyond the limits of his district. In 1854 he was re-elected to the Supreme Bench by a large majority, even though the wave of Know-Nothingism swept nearly all the Democrats off the political deck. After he had served two of the fifteen years for which he was re-elected as Chief Justice, he was called to Mr. Buchanan's Cabinet as Attorney General.

The first three years of his service as Cabinet Minister served only to lay the foundation for the graver duties of the fourth. From the moment he entered upon his duties as Attorney-General he laid a strong hand, not only upon the duties of his office but upon the whole Administration, of which he was the legal adviser. His long acquaintance with the moods and methods of the President, and his influence with him was often called into requisition by the other Cabinet Ministers in approaching him upon matters of import, the discussion of which demanded more time and greater quiet than

was often given save to one who had at all times had access to, and the ready ear of the Executive.

Just before Judge Black's Cabinet service ended, Mr. Buchanan nominated him against his wish and request, for Associate Justice of the Supreme Court. His nomination was never acted upon by the Republican Senate and Mr. Lincoln named Judge Swayne, of Ohio.

He was then elected Reporter of the Supreme Court, but did not hold that office long, for practice began to crowd upon him.

After Judge Black's service as Cabinet Minister he returned to Pennsylvania and selected for his future home a beautiful spot upon an eminence overlooking York and within sight of the sleepy waters of the Codorus Creek, upon which his forefathers had settled in the seventeenth century. His fame as a lawyer was so great, however, that many important cases followed him into the seclusion of his country home, and his life has been a busy one all these years and the demands for his services were greater than he cared to accept. He left public life poor, and returned to his native State to rebuild his fortune.

Within the past twenty years he has argued more important cases before the Supreme Court than almost any other attorney in the country. His greatest case, pecuniarly, was doubtless the New Almeden Quicksilver Mining Company of California. The testimony in this case covered 8,000 printed pages and the opposing counsels' briefs were 1,700 pages long. Reverdy Johnson, Chas. O'Connor and Judah P. Benjamin were the counsel on the other side, and R. B. Curtis and Caleb Cushing were at one time or another connected with him in the case.— He made the final argument and condensed the points of all this mass of testimony in an eight-hour speech, which is counted as the greatest legal effort of his life. He won the case, and received one of the largest fees ever paid an American lawyer. His arguments in the many cases involving the constitutionality of the Reconstruction acts are familiar history.— His great effort in the Milliken case, which secured a decision from the Supreme Court denying the right of a military commission to try a citizen for his life, is also well known. The late President Garfield was associated with him in this case. The Campbell will case and many other important cases were also in his hands. His legal work before the Electoral Commission, where he was one of the Democratic counsel, is of so recent date that extended mention of it is unnecessary.

THE BAR MEETING.

In obedience to call the members of the Bar of York assembled Monday afternoon at the residence of Judge Gibson, for the purpose of taking suitable action in relation to the death of the late Hon. Jeremiah S. Black, late a member of their body.— Judge Wickes was called to the chair, and E. W. Spangler appointed secretary.— Judge Wickes made an eloquent and beautiful address upon the great virtues, worth and intellectual attainments of Judge Black, as a lawyer, jurist and statesman.

V. K. Keesey, Esq., paid a warm tribute of respect to the memory of the deceased in a very able address. He spoke of his eminent abilities, in his home and social life, and moved that the following minute be adopted :

One of the foremost men of the nation has fallen. A great light has passed out of this world forever. A wise counselor, an eminent jurist, an illustrious statesman is silenced; a good man cut down and his works of charity and benevolence suspended.

God has removed from among us Jeremiah S. Black, a member of this bar, whose wealth of learning, sound judgment, subtle wit, retentive memory, accuracy of thought, precision and force of language, fearless devotion to the right, and denunciation of wrong, high sense of honor and unspotted integrity formed a brilliant example fit to imitate, hard to equal and not to be excelled. Whilst the

nation, the State and the commonwealth at large mourn their great loss, we the members of the York Bar, as a further token of our great sorrow, request this minute to be entered upon the records of the Courts:

Resolved, That our sincere sympathies are extended to those who lament the affliction that has bereaved them of a devoted husband, a kind and affectionate father.

Resolved, That we will attend the funeral of the deceased.

Resolved, That a copy of this minute be sent by the Secretary to the members of his family.

The minute was seconded by Judge Gibson, who spoke of Judge Black's courtesy while Chief Justice, his wit and humor in conversation, his pre-eminence as a fornesic orator, and the elegance of dictation and irrevocable logic which characterized his judicial opinions.

W. C. Chapman, H. H. McClune and Levi Maish, Esqrs., adverted to the genius and greatness of the deceased in touching eulogies.

On motion of John Blackford, Esq., it was ordered that the Court House be draped in mourning out of respect to the memory of the late jurist.

On motion the chair appointed, Hon. Robert J. Fisher, V. K. Keesey, W. C. Chapman and C. B. Wallace, Esqs., as honorary pall-bearers at the funeral of the deceased. The meeting then adjourned.

THE FUNERAL SERVICES.

Tuesday all that was mortal of Jeremiah S. Black was returned to the earth from whence it came. At the hour appointed for the funeral services the spacious grounds at Brockie were thronged with people and vehicles. At no time in the history of York have so many notable personages been assembled within its confines. From every walk of life were men, who in the solemn task before them, came upon a common plane—all were mourners at the bier of one who was great among the greatest.

A gold plate on the lid bore simply the inscription:

JEREMIAH S. BLACK,
BORN JANUARY 10, 1810,
DIED AUGUST 19, 1883.

The remains were excellently preserved and the appearance of the face was very little changed from what it had been in life. His last illness was brief and left but little impress upon his features.

The funeral services were very brief, lasting less than half an hour, and were opened with prayer by Rev. J. O. Miller, of Trinity Reformed church, York. Frederick D. Power, pastor of Vermont avenue Christian church, Washington, D. C., and Chaplain of the House of Representatives, delivered the sermon.

The casket was then conveyed to the hearse by the pall-bearers: Chief Justice Ulysses Mercur, Hon. W. J. Bear, of Somerset County; Hon. Pere L. Wickes, of York; Hon. John Gibson, of York; Gen. W. S. Hancock, U. S. A.; Gen. Crawford, U. S. A; A. B. Farquhar, George Small, W. Latimer Small and George H. Sprigg, of York.

The services at the grave consisted of an eloquent and impressive prayer, followed by a brief liturgical burial service by Rev. Dr. Power.

Benediction was pronounced by Rev. Arthur Powell.

Among the distinguished people who arrived from abroad to pay honor to the deceased were the following:

General W. S. Hancock, U. S. A.

Governor Pattison and State Senator Gordon.

General S. W. Crawford, U. S. A., Gen. W. H. Koontz and Judge W. J. Bear, of Somerset, Pa., and Hon. A. M. Gibson, of Washington, D. C.

Colonel J. K. Longwell, Hon. Judge William P. Maulsby, of Maryland.

Mr. and Mrs. Charles Spear and Mrs. Dawson of Pittsburg.

Chief Justice Mercur.

Mrs. Ogle, of Somerset, a sister to Mrs. Judge Black, and her daughter.

Senators Mylin and Stehman, clerk of

the Senate Cochran; B. F. Myers of the *Patriot;* George A. Irving, Hon. W. S. Stenger, Secretary of State, Messrs. Bigler, McDonald, Colburn, Wayne and Walker, committee of the House, and the Senate committee, consisting of Senators Ross, Patton, Sill, Gordon, Stewart and Grady.

Ex-Governor Henry M Hoyt, Chauncey Sargeant, of Philadelphia, Hon. Chas. R. Buckalew, of Columbia county.

Judge J. B. Livingston, of Lancaster.
Ex-Senator Charles R. Buckalew.
Hon. W. B. Groesbeck, of Cincinnati.
Ex-Minister to Austria Watts.
H. M. North of Columbia.
S. H. Reynolds, of Lancaster.
Senator Lee.
J. Hay Brown, of Lancaster.
Senator Thomas B. Cooper.
W. U. Hensel, of Lancaster.
J. V. L. Findlay, of Baltimore.
J. B. Niles, of Tioga county.
B. K. Jamison, of Philadelphia.
Hon. W. H. Welsh, of Baltimore.
James Young, of Middletown.
B. McGran, of Lancaster.
A. J. Kauffman, of Columbia,
J. J. Grimeson, of Chambersburg.

GOVERNOR PATTISON'S TRIBUTE.

Governor Pattison addressed the Granger's picnic at Williams' Grove on Tuesday morning, and closed his remarks with the following words:

In concluding, I cannot as a Pennsylvanian refrain from paying a public tribute to the worth of one of your number who is now being laid to final rest in an adjoining county. The town of York to-day is enveloped in funeral gloom. She is burying her great and honored citizen. Judge Black is dead. In a few hours, as the sun goes down to its setting, his parting rays will fall with mellow light upon the fresh turf that hides forever from human view the form of the chief justice whom Pennsylvania loved and the nation admired.—As a jurist, as a statesman, as a scholar, as the friend of labor and a fearless denouncer of wrong, he did great service for his State and his name should be held in honored remembrance. An actor in stirring scenes and trying times in our history, he lived to see obloquy retire abashed and truth vindicate the purity of his purposes and the sincerity of his convictions. His death has impoverished us and bereft the nation. While the tolling bell sounds solemnly in the hills of York it is fitting that we should pause a while to lament our loss and honor our worthy dead.

The following curious legal decision, which is almost as absurd as some that have emanated from the bench in this country is recorded on the archives of a Court in India:

"Four men, partners in business, bought some cotton bales. That the rats might not destroy the cotton, the men bought a cat. They agreed that each of the four should own a particular leg of the cat; and each adorned with beads and other ornaments the leg thus apportioned to him. The cat, by an accident, injured one of its legs. The owner of that member wound about it a rag soaked in oil. The cat going too near the fire set the rag on fire, and, being in great pain, rushed in among the cotton bales where she was accustomed to hunt rats. The cotton thereby took fire and was burned up. It was a total loss. The three other partners brought a suit, to recover the value of the cotton, against the fourth partner who owned the particular leg of the cat. The judge examined the case and decided thus: 'The leg that had the oil rag on it was hurt; the cat could not use that leg; in fact, it held up that leg, and ran with the other three legs. The three unhurt legs, therefore, carried the fire to the cotton, and are alone capable. The injured leg is not to be blamed. The three partners who owned the three legs with which the cat ran to the cotton will pay the whole value of the bales to the partner who was the proprietor of the injured leg.'"

YORK LEGAL RECORD.

VOL. IV. THURSDAY, AUGUST 30, 1883. No. 26

COMMON PLEAS.

C. P. of Luzurne County

Anthracite Building and Loan Association v. Lyons.

Building Association—Opening judgment—Burden of Proof—Evidence—Fraud—Execution of Paper by illiterate man.

Where, by the charter of a building association, the right to collect otherwise usurious interest premiums, and fines was qualified by a proviso, "that such stockholder shall have signed an agreement containing the following words," etc., the association can only recover the actual amount loaned, with simple interest, if the borrowing stockholder had not signed the agreement referred to.

The act of April 15th, 1869, does not require that the evidence of a party in interest, though the only evidence on his side, should be corroborated to make it effective.

If a party who can read will not read a deed put before him for execution, or if being unable to read will not demand to have it read or explained to him, he is guilty of supine negligence, which is not the subject of protection, either at law or equity.

April 25, 1881. RICE, P. J.—The judgment, of which this is evidently a revival, was given by a defendant to secure the repayment of a loan made by him in June, 1871. The premium paid for the loan was $101 on a share. The amount of the loan was $1,000, and the premium being deducted the actual amount of cash received by him was $495. On the whole amount of $1,000 he paid interest at the rate of one-half of one per cent a month for several years, but very irregularly, and consequently he was fined on each default in payment of interest, and these fines were in many cases compounded. We make no allusion to the dues paid, nor the fines on the dues, for the reason that these payments were not on account of the loan, and until there is an application to withdraw, or to have stock or dues applied in payment of the loan, the association is certainly not bound to apply them, but if nothing else prevented would be entitled to have its judgment security kept in force for the full amount.

As the case now stands, the only question presented is, whether the premiums charged and deducted, the various sums paid as interest on the loan, and the various fines charged on default in payment of interest, and fines on such fines, are usurious? The question is raised by article v. of the charter, which provides that the premiums, fines, and charges that may be paid by stockholders shall not be deemed usurious, "provided that such stockholders shall have signed an agreement containing the following words, to wit: "We, the stockholders and trustees of stock in the Anthracite Building and Loan Association, . . whose names are hereunto subscribed, do hereby agree to, and bind ourselves, our heirs, executors, administrators, and assigns, to abide by the provisions of the charter of the association and such by-laws as are, or may be hereafter, adopted." This provision of the constitution is peculiar, but undoubtedly lawful, and if the defendant did not subscribe the agreement prescribed, then the payments alluded to are usurious, and should be deducted from the judgment, and no *laches* nor delay on his part can make them lawful. It appears from the depositions that the defendant is an illiterate man, and cannot write. He swears that he never subscribed his name to this agreement, and never authorized any other person to sign for him. On the part of the plaintiff it is shown that his name is subscribed with others under the agreement, which is entered in a book of the association called "Registry of stockholders," but it is not claimed to be in the handwriting of the defendant. The agreement is on the first page of the book, and the name of the defendant is written on the seventh page, the intermediate pages, as would seem from the depositions, being taken up by the signatures of other stockholders. Mr. O'Neill testifies that he was attorney for the association; that at one of the meeting, held in the early part of 1871, he requested the members to come forward and

sign their names to the book; that he made a personal request to the defendant to sign his name, and that the latter told the witness he could not write, and that the witness should sign his name for him, and it would be all right, that at this time the regular business of the meeting was going on; that at the time when he requested the defendant to sign the book was open at the page where the latter's name was subscribed, and that he had no recollection of explaining to the stockholders or the defendant that the agreement prescribed by the charter preceeded their or his signatures. It appears, also, in the testimony of J. J. Scanlon, the subscribing witness to each of the following papers, that at the time of the making of this loan the defendant made his mark to the following assignment in the transfer book:

"WILKES-BARRE, PA., *June 30, 1871.*

"I hereby transfer to the Anthracite Building and Loan Association five shares of certificate No. 101 in the said association as collateral security for the repayment of money loaned by them to me, and also of all interest, fines, dues on stock, or other charges which may accrue according to the charter.

his
"Attest: THOMAS x LYONS.
mark.

"J. J. SCANLON, *Treas.*"

And that at the same time he made his mark to the following receipt in another part of the book:

WILKES-BARRE, PA., *June 30, 1871.*

"Received of the Anthracite Building and Loan Association one thousand dollars as a loan from the permanent fund, for the repayment of which, with all interest, fines, dues on stock, and other charges, I have given as collateral security five shares of certificate No. 101 in the said association and a judgment note for one thousand dollars.

his
"Attest: THOMAS x LYONS.
"J. J. SCANLON." mark.

It is not alleged that either of these documents were read or explained to the defendant, and the execution of them is denied, certainly inferentially, by the defendant, who swears that he signed his name but once for the occasion, and that was when he executed the note. It is argued that the payment of interest and fines for a series of years without objection is inconsistent with defendant's present allegation. We cannot so regard it. The mere payment of usury without objection furnishes no ground of estoppel, nor evidence that the defendant felt himself legally bound to pay it. We therefore dismiss this fact from our consideration. Neither do we regard the signing of the assignment and receipt as equivalent to the signing of the agreement prescribed by the constitution. If they have any weight, it is simply as corroboration. The questions presented for adjudication are, first, did the defendant authorize Mr. O'Neill to sign his name, as alleged by the plaintiff; and, second, if he did, are there any circumstances connected with the transaction which would warrant an inference that his signature was obtained by fraud, or fraudulent concealment of the contents of the instrument he was asked to sign. As to the first question suggested, it will be observed from the brief synopsis of the evidence which we have given that there is a direct and apparently irreconcilable conflict between the defendant and Mr. O'Neill.

A mere conflict, especially since the passage of the act of 1869, permitting parties to testify, will not warrant the granting of an issue; Philbin *v.* Davenger, 1 Luz. Leg. Reg. 507.

As a general rule, where a party has confessed a judgment to another, which has been entered of record, his own deposition alleging fraud and the like, but contradicted flatly by the deposition of the plaintiff, will not prevail to open the judgment; Kocker *v.* Rice, 2 Luzurne Legal Reg. 24.

The rules declared in the two cases cited have been followed in many other cases in

this court, and we do not propose to depart from them. They must not, however, be misapplied. As we understand the cases, they apply only where the conflict is over the equity which the defendant sets up as his ground for relief, and which he must establish, or be left where he had placed himself under the law. To extend the rule further, so as to hold that, in every instance, where there is a conflict between the plaintiff and the defendant, even though it be over a matter which is a part of the plaintiff's case in rebuttal of the defendant's equity or right to relief, the scales must be tipped to the plaintiff's side would be a practical nullification of the act of 1869, as is abundantly shown in the late cases of Ballentine *v.* White, 27 Sm. 20; Prowattain *v.* Tidall, 30 Sm. 295; Flattery's Appeal, 7 Nor. 27, and Shaffer *v.* Clark, 9 Nor. 94.

Even the rule in equity, which has never been adopted in common law practice, that where the answer is responsive to the bill, and the evidence of only one person affirms what has been so negatived, then the court will neither make a decree, nor send it to a trial at law. 2 Dan. Ch. 283*, would not be authority for such a general rule; for, in equity, where the answer of the defennant is not responsive to the bill, but sets up affirmative allegations in opposition to, or in avoidance of, the plaintiff's demand, and is replied to, the answer is of no avail in respect to such allegations, and the defendant is as much bound to establish the allegations so made by independent testimony as the plaintiff is to sustain his bill; Dan. Ch. 984* note.

Assuming, then, that the defendant in a motion to open a judgment is the actor, and that the burden of proof, in the first instance, is on him, how does the case stand? He alleges that there is included in this judgment five hundred and five dollars which he never had, and that he has paid interest on this sum and interest or fines on this interest. His testimony would make a *prima facie* case of usury. The plaintiff association answers, not by denying these payments and the deduction of this premium, but by the affirmative allegation that they were authorized by the charter and properly chargeable, because the defendant signed the agreement prescribed by article v. of the constitution.—When the issue is thus presented, it is plain to be seen that the burden of proof that he did not sign the agreement is not on the defendant, but is rather on the plaintiff of showing that he did, and in such an issue we therefore would not be justified in laying down a general rule that the oath of the plaintiff *per se* shall have greater weight than that of the defendant. In the disposition of the first question of fact, then, we are unassisted, by the rules laid down in Philbin *v.* Davenger and Rocher *v.* Rice, *supra*, and it therefore becomes almost purely a question of credibility of the witnesses, and this must go to a jury. We suggested that the assignment of stock and receipt might furnish some corroboration for the plaintiff. This would be so, provided their execution were satisfactorily established, but even as to that fact there is a conflict between Mr. Scanlon, the subscribing witness, and the defendant, and before we could treat it as corroborative we would have again to decide a fine question of credibility.—It was urged quite strenuously for the defendant that even conceding that he signed the agreement, it was not shown that it was read or explained to him, and this raises the second question heretofore suggested. We need not enlarge upon this question, but we deem it proper to say that if the execution of the agreement were established) and as to this question of fact we express no opinion, as it must go to a jury,) the simple fact that it was not read or explained to him would not, under the circumstances of this case, be sufficient to send an issue to a jury. It does not appear affirmatively that the defendant cannot read, nor does it appear that any misrepresentations were made to

him of its contents, nor does it appear that he asked to have it read; therefore, assuming that he signed the agreement under the circumstances detailed by the plaintiff's witness, the case would come within the rule declared by Gibson, C. J., in Greenfield's Estate, 2 H. 496: "If a party who can read will not read a deed put before him for execution, or if being unable to read will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either at law or in equity." This rule was followed in its fullest extent in Pennsylvania R. R. Co. *v.* Shay, 1 Nor. 198.

This rule is made absolute, and issue awarded, note to stand for a declaration, and the execution theory to be taken as admitted, the plea to be *nil debit*, payment, etc.

C. P. of Lancaster County

Wolf v. Yohn.

The statute of 1725 in reference to issuing writs of capias and the exemption of freeholds from arrest is not repealed by the Act of 1836, but is expressly declared operative by the Act of April 14, 1838.

May 1st, 1883, rule to show cause why the order made April 28th, 1883, on motion of counsel for the defendants, should not be rescinded and the writ reinstated, and the thirty shillings refunded to said plaintiff by the defendant.

August 18, 1883. PATTERSON, A.L.J. —The rule above recited must be discharged.

That the old statute of 1725, in reference to the issuing any writ of arrest against a defendant, exempt from arrest, is still in force, can not be doubted.

The Court was well satisfied of that on April 28th, 1883, when the defendant in the above action on that day, first showing that the writ of *capias* has been issued on the preceding day—the 27th—made his motion on affidavit filed, alleging his freehold (which was not disputed,) that the said writ be abated, &c.

Accordingly the Court holding, under that statute, that "a freeholder who is priviliged from arrest on a *capias* will be entitled under such circumstances to have the writ quashed," the order abating the writ was made.

The said old statute of 1725 was operative, ever since the act of 1838, seems to have been the uniform judgment of the Courts from that period up to the present time.

In the absence of any decision of the Supreme Court, we must be governed by our own convictions and the decisions of the lower Courts; the latter have been uniformily in the same direction.

We refer to some: See—

Blackiston *v.* Potts, 2 Miles 388, decided in 1840.

2 W. N. C. 186, Dobson *v.* Fitzpatrick, and Jellyman *v.* Same (THAYER, P. J.): "a freeholder does not waive his exemption from arrest on a *capias ad respondendum* by moving to reduce the bail on which he is held." Rule absolute to abate writs of *capias* with costs.

3 W. N. C. 302, Buckman *v.* Jones:— "Defendant proved himself a freeholder. Court abate the writ with an allowance of thirty shillings cost."

10 W. N. C. 553, Ingersol *v.* Campbell: Defendant entered his plea of freehold on *capias* had been served September 20th, 1881, returnable October 1st, 1881, October 8th, 1881. "Rule to quash *capias* made absolute," and the Court added that "in the absence of any decision of the Supreme Court we consider it to be a hardship to limit the defendant in entering his claim of freeholder.

The only exceptions seems to be when an unprivileged person unite, in a joint trespass, and both are sued in one action, the former loses his privilege: W. N. C. of June 21st, 1883, Beale *v.* Hoag et al. But that is not the case before us.

Rule discharged.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, SEPTEMBER 6, 1883. No. 27

COMMON PLEAS.

C. P. of Lancaster Co.

Eckman v. Hildebrand.

Tender—What is sufficient.

A tender, to be a legal one, must be for the full amount due, and when once made, to be effectual, must be kept up at every stage of the action.

The proper course, no doubt, would be to pay the money into Court upon leave obtained

The rule that the money must be counted down in gold or silver, or legal tender, is dispensed with if the creditor refuses to receive it before it is counted.

Rule to show cause why execution should not be stayed, &c.

August 18, 1883. LIVINGSTON, P. J.

The docket entry is as follows:

Benjamin Eckman *v.* John Hildebrand, of Strasburg township.

January T., 1882, No. 1482. Debt $5,600. Judgment against the defendant for this penalty on a judgment bond, dated April 9th, 1877, conditioned to pay the sum of twenty-eight hundred dollars ($2,800) on April 1, 1878, with interest from the date hereof. Entered April 8, 1882.

Defendant waives the $300 law of April 9, 1849.

On this judgment a *fi. fa.* was issued April 9, 1883, to April term, 1883, No. 85, by virtue of which the sheriff, on April 11, 1883, levied on personal property of defendant.

On April 14, 1883, the defendant filed and presented to the Court a petition representing that on April 9, 1877, he executed and delivered to plaintiff a judgment bond in the penalty of $5,600, conditioned to pay $2,800, with interest, on April 1, 1878.

That on or about the 1st day of April, of each year, 1878, 1879, 1880 and 1881, he paid to defendant the sum of $168, being the interest on said $2,800 for one year, and on or about April 1, 1881, he paid to plaintiff $800 on account of the principal, leaving then due but $2,000.—This, on the argument, was admitted by plaintiff's counsel to be true and correct.

Defendant further alleges that, on or about April 1, 1882, he paid plaintiff $120, being the interest on the $2,000 for one year, and caused to be tendered to him the further sum of $2,000, the amount due on said judgment, which the plaintiff then refused to receive. And, that he subsequently, on or about August 17, 1882, again caused to be tendered to plaintiff the sum of $2,000, together with interest, in full to the date of tender, and plaintiff again refused to take or receive the same.

That plaintiff entered said judgment bond in the prothonotary's office on April 9, 1883, had an execution issued thereon for said sum of $2,000, with interest from April 1, 1882, and costs. That, on April 11, 1883, defendant *paid to the Sheriff* $2,000, being as he believes the full amount due on said judgment. And that since said payment the sheriff has made a levy on his personal property for the purpose of collecting interest and costs claimed by the plaintiff in the execution, &c. Whereupon the Court granted the rule above stated.

The allegation of defendant is, that he, on two occasions, once on or about April 1, 1882, and once about the middle of August, 1882, tendered or caused to be tendered to plaintiff the amount due him, with interest, and the last time sufficient to cover costs also, and that on both occasions plaintiff refused to receive the money tendered.

The plaintiff, on the contrary, alleges that defendant never notified him that he intended to pay the debt (which he understood was to remain for another year,) until April 4, 1882, and that he never made him a *legal tender* of the debt, interest and costs due him on this judgment.

Plaintiff holds a judgment against the defendant; it was over due, and the testimony produced shows no such contract or agreement between the parties, for its continuance for another year, as would

prevent the plaintiff from issuing an execution at pleasure or estop the defendant from paying the debt, or making a tender to plaintiff of the debt, interests and costs due, which, if a legal tender, would have the effect in law which would follow a legal tender in any case.

The Act of 1705, § 2, Purd. 488, pl. 2, declares that: "in all cases, where a tender shall be made, and full payment offered, by discount or otherwise, in such specie as the party by contract ought to do, and the party to whom such tender shall be made refuse the same, and yet afterwards will sue for the debt or goods so tendered, the plaintiff shall not recover any costs in such suit."

And the Act of May 12, 1867, Purd. 1395, pl. 1, declares that: "In all actions for the recovery of money, founded on contract hereafter brought, in any of the Courts of this Commonwealth, or before any of the justices of the peace or aldermen thereof, the defendant or defendants therein shall have the right, at any time before trial in Court, to make the plaintiff or plaintiffs a tender of lawful money, equal to the amount he or they shall admit to be due, with all lawful costs incurred in said action up to the date of making such tender; and, if the party to whom such tender shall be made, refuses to accept the same, then in the event of the plaintiffs failing to recover more than the principal sum, so as aforesaid tendered, with legal interest thereon, he or they shall pay all costs legally incurred in the said action after the time of the tender aforesaid, &c. It will be observed that neither of these Acts define a tender or describe how it shall be made to be legal.

WHARTON says: A tender is where a debtor offers to his creditor legal money sufficient to pay a definite debt, which has matured in full, and to be effective, it must cover not only the debt but all *interest*, and if made after suit has been commenced, it must also include all *costs* that have been incurred in maintaining the suit: Whar. Con. §970, &c.

A mere offer to pay money is not, in legal strictness, a tender: 2 Dall. 190.

In Sheredine *v.* Gaul, 3 Barr 383, it is said: In strictness of law, where a tender is made, the money must be counted down in gold or silver, (this, however, was prior to the issue of our *legal tender paper-money*, which would *now* be sufficient) and offered to the party. Where, however, one approaches another, and offers to pay him a certain sum of money which he owes him, and has the money with him in specie (or legal tender notes) ready to pay, and the other party dispenses with the counting down the money, *by refusing to receive it before it is counted*, the tender would be good; but if the creditor does not refuse to receive the money, then a regular legal tender is by counting down the money and offering it to the creditor.

No tender is a substantial one but a legal tender; 10 S. & R. 14.

A tender must be wholly unconditional. The true rule is, or at least should be, that no condition possibly harmful to the creditor must be annexed, such as a receipt in full for all demands, or for the surrender of an obligation showing that more it due than is tendered, &c.: 2 Par. Notes and Bills 625.

The full amount due must also be tendered, as the *most trifling deficiency* destroys the legal effect of the offer to pay; and, where a tender is made, the defendand is *required to keep up said tender at every trial of the action, or pay the money into Court on leave obtained.*

After fully examining and carefully considering the testimony presented, we are of opinion that there was no legal tender made in this case on April 4, 1882. We think, however, that the testimony shows and would warrant a jury in finding as a fact, that a legal tender was made by the defendant to the plaintiffs on August 17, 1882; and, in our opinion, a legal tender was then made; but it cannot avail the defendant in this proceeding, *because it has not been kept up by him.*— By his tender and evidence, defendant admits, that the amount due, and tendered to plaintiff was about $2,047, and when the execution was issued and demand thus made, defendant did not renew his tender of $2,047, nor pay or offer to pay to the sheriff the amount he tendered to plaintiff, but he paid to the sheriff $2,000 only, some $47 less than the sum tendered and admitted to be due by the tender at the time it was made, on August 19, 1882.— This, of course, renders the tender of no

value to the defendant, and the rule to show cause why the execution should not be stayed, must therefore be discharged.

Rule discharged.

SUPREME COURT.

Cooper v. Shaver.

The following indorsement on the abstract of proceedings in a judgment in the Common Pleas, viz.: "I authorize any attorney or prothonotary to enter judgment against me for the within amount," is sufficient to authorize the entry of judgment.

Error to the Court of Common Pleas of Crawford county.

On the 8th of December, 1873, Orin Conner entered judgment against H. Connor for $225, and on the 11th of January, 1876, assigned in the record this judgment to J. P. Ames, who on the 20th of January, 1876, assigned the judgment to Geo. Markham, and on the 24th of April, 1876, the latter person and one J. C. Looker assigned the judgment to Ezra Cooper. This latter assignment was made on the back of the prothonotary's abstract. Indorsed on the same abstract appears the following words:

"For value received from E. Cooper, I guarantee the collection of the within amount, waiving all exemption laws, and without stay of execution, and I authorize any attorney or prothonotary to enter judgment against me for the amount.

Apr., 1876. CLARK SHAVER."

Of the words "Apr., 1876," there appears in the original papers to be an attempt at an erasure.

Upon this paper E. Cooper procured the entry by an attorney of the court below of a judgment against Clark Shaver for the amount of the original judgment upon an ordinary *narr.*, and without the assignments of breaches.

The defendant asked the court below to strike off the judgment as having been entered without authority.

The rule to strike off the judgment was made absolute, and judgment stricken off at costs of plaintiff.

The plaintiff thereupon took a writ of error, assigning the striking off of the judgment against Shaver as error.

December 30, 1882. TRUNKEY, J.

It has not been pretended that title is the judgment set forth in the abstract is not vested in Cooper. But the conclusion that he has such title is reached only by reading the abstract with the assignment. Standing alone the assignment would be void for uncertainty; being indorsed upon the abstract both are taken to evidence the transfer. Shaver's guaranty is also so indorsed, and the abstract, assignment and guaranty together, as if one instrument, evidence his contract, The judgment is particularly described, and so is the court where it is entered: the real debt, date of interest, and plaintiff's costs, are stated; then follow the assignment to Cooper, and Shaver's guaranty of the collection. Hypercriticism would fail to exclude understanding that Shaver guaranteed collection of the judgment described in the abstract, and authorized any attorney or prothonotary to enter judgment against him for the amount of that judgment.

For present purposes let it be understood that Shaver is not bound to pay the money unless it be shown that it could not have been collected from the defendant in the judgment by due diligence. The pending question is not one for stay of execution until Shaver's liability be determined, nor for an issue to try that; but whether the warrant of attorney is void.

The defendant says truly, that the letter of the Act of February 24, 1806, only authorizes the prothonotary to enter judgment where judgment is confessed in the instrument of writing, or where the instrument contains a warrant for an attorney at law or other person to confess judgment. But if the warrant authorizes the prothonotary to enter judgment for the amount named in the instrument, it is within the spirit of the statute, a chief object of which was to enable parties to dispense with the services of an attorney. Before the date of the statute it had long been within the power of attorneys to confess judgments and cause them to be entered, as it has been since.

Attorneys are officers of the court, and before admission take a prescribed official oath. In the sections of the Act of 1834 regulating their admission, prescribing penalties for misbehavior in office, and defining their powers and duties, they are styled attorneys; but it is plain that word means attorneys at law. The context definitively fixes the meaning. By law, in certain cases, the prothonotary may enter judgments, attorneys may confess judgments, and the courts are defined having jurisdiction of such judgments. The prothonotary is an officer of the court, as well known to be be such as the judges.

In the instrument signed by Shaver, the

meaning of the words, "I authorize my attorney or prothonotary to enter judgment against me," is determined by the context, keeping in view the laws which define in what courts judgments may be confessed or entered, and what officers may confess or enter them. The word attorney as certainly means an officer of the court as does prothonotary, and the warrant authorizes any attorney of the Court of Common Pleas of Pennsylvania to confess judgment, or the prothonotary of any such court to enter judgment, as clearly as if written in so many words. The word confess is not used, but the prothonotary is authorized to enter judgment, which indicates that the attorney shall reach the same end by the proper means in performance of his duties.

The judgment entered April 14, 1882, is reversed, and the judgment confessed by virtue of the warrant of attorney, entered December 13, 1877, is reinstated.

Church's Appeal.

The court below may amend its record after a certiorari has issued to remove it to the Supreme Court.

When an attachment would lie against a party for non-performance of a decree in equity, it is also the proper remedy to enforce the payment of the costs. In such a case it is not contravention of the Act of July 12th, 1842.

Appeal from the decree of the Court of Common Pleas of Luzurne county.

A bill was filed against Charlotte Church and Joseph Church, her husband, to have the former declared a trustee as to certain land. The husband had no interest. A decree was entered in favor of the plaintiffs, with costs, from which an appeal to the Supreme Court was taken by the defendants. After the *certiorari* had gone out, and before the return day, the decree was amended by the court below, and, being certified in this shape, was affirmed by the Supreme Court.—The record was in due time remitted to the Common Pleas, about a year after, the costs not being paid, an order for an attachment for contempt was duly made against Joseph Church. His wife had died some time previously. This order was the subject of the assignment of error.

May 7, 1883. TRUNKEY, J.—From the final decree the respondents appealed, and filed the *certiorari* in the Court of Common Pleas on March 10th, 1877. Afterwards and before the return day of the writ, said decree was amended in the court below, and the record, setting forth the decree as amended, was certified and returned. That is the decree which was affirmed and remitted for enforcement, and whether there had been irregularities in the procedure for the amendment is a matter of no concern in the execution.—The alleged irregularities were prior to the final hearing and adjudication in the appellate court, and if it be conceded that the court below erred in making the amendment, the time for its correction was at or before that hearing; the decree, as affirmed, is valid until vacated by the court.

The bill was against Joseph Church and Charlotte, his wife, for a decree that they convey to the plaintiffs certain undivided interests in a tract of land, in accordance with an alleged trust created before and at the time the legal title to the land was vested in said Charlotte. Joseph Church was a necessary party, and it appears that he was an active party in contesting the plaintiff's demand. The result was a decree that Charlotte Church held the legal title to the land; that the defendants should convey said interests to the equitable owners thereof, and that the defendants pay the costs.

The Act of 1842 provides that no person shall be arrested or imprisoned on any civil process issued in any proceeding for the recovery of money due upon a judgment or decree founded upon contract, or due upon any contract, or for the recovery of damages for the non-performance of a contract. This suit was not for the recovery of money, but for the enforcement of a trust, and, therefore without the statute. It may be that the trust grew out of a contract, and that the suit was akin to a proceeding for specific performance, yet it is not within the spirit of the statute, for breaches of duty by trustees are excepted out of its operation: Chew's Appeal, 44 Pa. St. 247.

Where the decree against a party is founded upon his *tort*, or upon his breach of duty as a trustee, the costs imposed upon him follow his wrongful acts. In an action for recovery of money founded upon a contract, the costs are of the same nature, and the defendant is not liable to arrest for either debt or cost: Pierce *v.* Scott; 40 Legal Intell. 320. But where the party is liable to arrest to enforce the payment of money, or the performance of a specific thing, he is, also, for the costs taxed against him in the judgment or decree.

The order awarding an attachment is affirmed, and appeal dismissed, at the costs of appellant.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, SEPTEMBER 13, 1883. No. 28

QUARTER SESSIONS.

Q. S. of Lancaster County.

Bridge in Rapho and West Hempfield Twps.

Bridges—Reports of Views—Grand Jury.

The action of the Grand Jury upon the reports of viewers, re-viewers and re-re-viewers of a bridge determines the proceedings. Hence, when one of the reports is approved by that body, the Court has no right to set aside their action, unless for irregularity or want of jurisdiction in the Grand Jury.

Bridge view, re-view and re-re-viewers.

Rule granted April 24, 1883, to show cause why the action of the grand jury, on the reports made on the several views, should not be set aside.

August 18, 1883. LIVINGSTON, P. J.—At November Sessions, 1881, a petition was presented to the Court and viewers were appointed to view a site for a bridge over "Big Chickies Creek," between the townships of Rapho and West Hempfield, on the road leading from Silver Spring to Mount Joy, in Lancaster county. The viewers reported in favor of a bridge, fixed its location, and viewed and reported the changes necessary to be made in the said road to make the proper connection with such bridge. This report was confirmed *nisi* January 16, 1882.

On April 17, 1882, a petition for a review was filed and presented and reviewers were appointed. They reported in favor of a bridge also, but fixed its location at a point different from that reported by the viewers, making no change in the road. Their report was confirmed *nisi* August 21, 1882.

And, on November 20, 1882, a petition was filed and presented, and re-re-viewers were appointed, who reported also in favor of the erection of a bridge, and adopted the location reported by the first viewers, making the changes in said road necessary to connect it with such bridge when erected. Their report was confirmed *nisi* January 15, 1883.

All these reports were duly presented to the grand jury for their approval by the counsel representing them at April Sessions, 1883, and, after hearing testimony and the counsel interested, the grand jury on April 19, 1883, returned to the Court the report of the re-viewers "approved," and the reports of the viewers and re-re-viewers "not approved."

And, on April 24, 1883, on motion of E. D. North, Esq., a rule was granted to show cause why the action of the grand jury on the above reports should not be set aside and annulled, and the reports be referred to another grand jury.

Section 35 of the Act of 13th of June, 1836, relative to roads, highways and bridges, declares that: "When a river, creek or rivulet, over which it may be necessary to erect a bridge, crosses a public road or highway, and the erecting of such bridge requires more expense than it is reasonable that one or two adjoining townships should bear, the Court having jurisdiction as aforesaid shall, on the representation of the supervisors, or on the petition of any of the inhabitants of the respective townships, order a view in the manner provided for in the case of roads: and if, on the report of viewers, it shall appear to the Court, grand jury and commissioners of the county, that such bridge is necessary, and would be too expensive for such township or townships, it shall be entered on record as a county bridge."

Section 37 of the same Act declares that: "Viewers of the site of a bridge, appointed as aforesaid, shall have authority by virtue of their appointment to report also whether any change in the course or bed of the road to be connected therewith will be necessary in order to the erection of such bridge at the most suitable place, or at the least expense, or in the best manner; and the same being approved by a majority of the commissioners of the county, and also by the Court, such road shall be altered accordingly." And, by the same Act, the

Court is authorized to appoint re-viewers. etc., etc.

Here three views were had, and three reports made and submitted to the grand jury, all favoring the erection of a bridge, but one of them locating it at one point, the other two at a different point: the grand jury could approve but one report, one location or cite, and they after investigation and hearing evidence, approved the report of the re-viewers, as we have stated. Why should their action be set aside? No testimony has been taken or presented, showing that they behaved improperly, or exceeded their jurisdiction in passing upon these reports.

In the Pequea Bridge case, 18 Sm. 427, the Supreme Court says; It is evident that the Legislature intended that these three bodies, the Court, grand jury and commissioners of this county, shall act as checks upon each other in the necessary expenditure of public money in the erection of county bridges. When either of them, therefore, have put their disapprobation on record the proceeding falls.

That, where a report of viewers recommending a bridge was referred to a grand jury, who approved it, the action of the grand jury was set aside for irregularity, and the report referred to another grand jury who reported "*no bridge*," the proceeding was set at an end, and referring the report to another grand jury was error. The dissatisfied parties should have commenced anew. As there has been no legal or reasonable ground shown for annulling or setting aside the action of the grand jury on the above reports, we need not discuss the propriety or legality of referring such reports, where the action of the grand jury, as to them, has been annulled or set aside, to another grand jury. The rule must be discharged, and the action of the grand jury and their return to the Court be permitted to stand.

Rule discharged.

SUPREME COURT.

City of Scranton v. Hill.

The plaintiff, while walking along the highway upon a dark night, turned aside for the purpose of taking a foot path which led through private property, and, by reason of a miscalculation as to his position, fell over the unguarded edge of a culvert and sustained severe injury thereby. It was in evidence that he was familiar with the condition of the place, having habitually travelled that way about fifteen years; and that, if he had not attempted to leave the street, the accident would not have occurred. HELD that the municipality was not liable.

Error to the Court of Common Pleas of Lackawanna county.

May 7, 1883. STERRETT, J.—The plaintiff below was severely injured by falling from the end of the culvert constructed under and across Main street, in the city of Scranton, and terminating somewhat abruptly several feet beyond the northwesterly line of the street. From a point on the same side of the street, a short distance beyond the culvert, a foot path diverged in the direction of plaintiff's home. According to the uncontradicted evidence in the case, including his own testimony, he intentionally left the street with the view of taking the path and following it homeward; but, by mistake, he turned off the street too soon, before he had crossed the culvert and reached the point where the path commenced, and was thus led to the end of the culvert from which he fell. If he had not purposely gone beyond the line of the street, or had not turned off quite so soon, it is very evident he would have encountered no danger. The unfortunate accident which befell him resulted not from the want of proper guards for the protection of those passing and re-passing along the street, but solely from the fact that he had determined to leave and did leave the street for the purpose above stated. In answer to a question on cross-examination, the plaintiff himself says he would not have fallen if he had not turned off the street. It cannot be doubted that if he had intended to keep within the lines of the street and proceed thereon in the direction he was going before he turned off to the left, he would have passed the cul-

vert in safety and without being exposed to any danger. The testimony is susceptible of no other rational conclusion. It follows, therefore, that in purposely leaving the public highway as he did he took upon himself the risk of every danger that beset his path; at least the city owed him no duty of protection in his voluntary effort not to follow the street, but to leave it in search of the foot path, through private property, over which the municipal authorities had no control whatever. In the first point submitted by the defendant below the court was requested to charge as follows: "It being the undisputed testimony in this case that the plaintiff left the public street of his own accord, for the purpose of entering upon a foot path without the limit of the highway, that he did so for his own convenience, having full knowledge of the condition of the highway at that point and its connection with the foot path, that he did so at his own peril, and he cannot recover." There was no conflict of testimony as to either of the allegations of fact embodied in this proposition. They were each clearly and conclusively established by the testimony of the plaintiff himself and other witnesses. Nor can there be any doubt as to the correctness of the legal conclusions drawn therefrom. We think, therefore, that the learned judge erred in submitting the facts to the jury, and in not affirming the points as presented, without any qualification or expression of doubt as to the correctness of the facts therein stated. The proposition was fatal to the defence, and conclusive of the plaintiff's right to recover upon the evidence before the court and jury. For reasons already suggested, the second and fourth assignments of error are also sustained. The undisputed evidence is that the end of the culvert from which the plaintiff below fell was several feet beyond the limits of the street. There was no testimony from which the jury could have found "that the plaintiff had not passed without the limits of the highway when the accident occurred." It was therefore error to submit a question of fact of which there was no evidence. The third, fifth, seventh and eighth specifications of error do not call for special notice. They are not sustained. The principle stated in that portion of the charge covered by the sixth assignment is perhaps unobjectionable in the abstract; but it had no application to the facts of the case under consideration, and was calculated to mislead the jury.

The first assignment of error being decisive of the case, we have deemed it unnecessary to elaborate the points involved in the other specifications.

Judgment reversed.

COMMON PLEAS.

C. P. of Chester County.

Perkins & Miller v. Nichols.

The omission of the middle letter in the name of a defendant, in the entry of a judgment, is fatal to the lien as against subsequent judgment creditors, not having actual notice, and whose judgments are properly entered.

Where the middle letter is omitted from each of two judgments, the fact that the initial is inserted in the index of the later judgment will not give it priority over the other

King v. Miller, 2 Chester Co. R., 45, cited with approval.

Exception to return of sheriff, (Fi. Fa. No. 90, October Term, 1882.)

The facts appear by the opinion of the Court.

August 20, 1883. FUTHEY, P. J. The real estate of Jos. S. Nichols, of Coatesville, was sold at sheriff's sale on a judgment held by Perkins & Miller. The property was purchased by them, and their receipt taken by the sheriff for the purchase money, as first lien creditors entitled to receive the same. Their right to thus receipt for the purchase moneys being disputed by Frederick A. Bickel, the next judgment creditor, the matter was referred to an auditor, to whose report exceptions have been filed.

It appears that the judgment of Perkins & Miller was entered by the prothonotary on a bond and warrant of attorney to con-

fess judgment, signed by Jos. S. Nichols, and was entered at once in the judgment docket, as authorized by the Act of March 23, 1853, applying to Chester and other counties, (Purdon 823, pl. 22,) and the judgment so entered was then indexed in the judgment index, as required by the Act of Assembly. It appears that the initial letter S. was written so small in the signature that it escaped the attention of the prothonotary, and the judgment was entered against Joseph Nichols, and so indexed. The entry stated the defendant as of Coatesville, where it appears all parties in interest reside. The next judgment is that of Frederick A. Bickel. This judgment was also entered on a bond and warrant of attorney, and was entered in like manner in the judgment docket against Joseph Nichols, without naming his residence and omitting the initial letter S., but the judgment thus entered was indexed against Joseph S. Nichols. Both these judgments were subsequently revived against Joseph S. Nichols, and so docketed and indexed. The auditor in his first report refers to the judgment held by Bickel as having been originally entered against Joseph S. Nichols, but he corrects this in his report on the exceptions, and there states that it was entered against Joseph Nichols.

The contention here is between these judgments, Mr. Bickel claiming that Perkins & Miller, whose judgment is prior in point of time, are not entitled to be paid as against him, by reason of the defective entry of their judgment, and that the moneys, so far as needed, should, in preference, be awarded in payment of the judgment held by him.

It is undoubtedly the general rule that the omission of the middle letter in the name of a defendant in the entry of a judgment is fatal to the lien as against subsequent judgment creditors, not having actual notice, and whose judgments are properly entered. It is the duty of the judgment creditor to see that his judgment is rightly entered. (Wood *v.* Reynolds, 7 W. & S. 406; Ridgway, Budd & Co.'s Appeal, 3 H. 177; Bergner's Appeal, 7 Nor. 120; Esther Hutchinson's Appeal, 11 Nor. 186; Peck's Appeal, 11 W. N. C. 31; King *v.* King & Miller, 2 Ches. Co. Rep. 45; Trickett on Liens, vol. 1, Sec. 231.

In the case before us, however, Frederick A. Bickel, the holder of the second judgment, is not in position to contest the right of Perkins & Miller, the holders of the first judgment. In the entry of both judgments the initial letter S. in the defendant's name, is omitted, and in this regard they are on the same footing. Their respective judgments were originally entered against Joseph Nichols, not Joseph S. Nichols, and were revived against Joseph S. Nichols. It is true that the prothonotary in indexing the judgment of Bickel, indexed it against Joseph S. Nichols. This in itself was an error of the prothonotary. There was no such judgment to index. He was indexing a judgment entered on the docket against Joseph Nichols, and could properly, in the index, only refer to that judgment. The purpose of the index where a separate judgment docket is kept, as in this county, is to give information of the entry of judgments in the docket, and to guide persons making searches to the place where they are entered. The index of this judgment of Bickel would simply direct persons making searches to a judgment against Joseph Nichols, not one against Joseph S. Nichols.

Whatever might have been the rights of Bickel as against Perkins & Miller, had his judgment been entered against Joseph S. Nichols, he certainly cannot here claim that his judgment against Joseph Nichols shall be paid in preference to Perkins & Miller's entered in the same way.

There are no other interests involved than those of the holders of these judgments. We are of the opinion that they should be paid in their order so far as the purchase money will extend, and the exceptions to the return of the sheriff are dismissed.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, SEPTEMBER 20, 1883. No. 29

COMMON PLEAS.

C. P. of Dauphin County.

Winters' Estate.

A sci. fa. to revive the lien of a judgment must substantially identify the original judgment by parties, date and amount.

The assignee of a part of a judgment sought to revive the lien, to the extent of the equitable interest, by sci. fa., reciting the judgment in the name of the legal, to the use of the equitable plaintiff, and naming the amount assigned. HELD, that the recital of the amount was a fatal variance, and that the judgment was not revived, in whole or in part.

Where the legal plaintiff is properly named, the addition of the name of the equitable plaintiff may be treated as surplusage.

Where the sci. fa. recite the original judgment against the defendant as against the defendant and his assignee, "terre tenant in possession, defendants," the variance is more important; and coupled with a variance in amount has weight as indicating that the sci. fa. and the original were based upon different transactions.

Where the equitable owner of part of a judgment seeks to revive it, to the extent of the equitable interest, the equitable owner of another part cannot, by a suggestion filed extend the lien to both.

Nor can the defendant extend the lien, by appearing to the sci. fa. and confessing judgment, after five years have elapsed and the land has been sold by an assignee.

The equitable owner who issued the sci. fa. and subsequent judgment creditors, have standing to object to such proceeding, and it is not going behind the record for an auditor to enquire into it to determine the question of lien

Exceptions to report of auditors to distribute.

The facts appear in the opinion of the Court.

July 18, 1883. MCPHERSON, A. L. J. —The facts is this case are as follows:

On May 4, 1877, the State Bank entered a judgment against George Winters, No. 145 to August Term, 1877, for a debt of $28,120.72. On October 11, 1878, a credit was entered thereon sufficient to reduce the amount to $20,000.00, and this was assigned by the Bank in various sums to a number of persons, among whom were Mary Dietrich and Catharine Creamer, their interests respectively being $1300 and $340. In 1879, Winters made an assignment for the benefit of creditors to P. K. Boyd, and, in 1880, a partial distribution was made, in which this judgment participated. On May 2, 1882, F. K. Boas, attorney for Mrs. Dietrich and Mrs. Creamer, issued two sci. fa's thereon, one in the name of the State Bank for the use of Mary Dietrich, No. 42 to August Term, 1882, and the other in the Bank's name for the use of Catharine Creamer, No. 43 to August Term, 1882. These writs are more fully described hereafter. Upon these sci. fa's judgments were entered, on May 27, 1882, for want of an appearance, for $1227.18 and $323.26 respectively. No further action was taken by any of the equitable plaintiffs until October 7, 1882, when Fleming & McCarroll, attorneys for Christian Ferrance et al., filed a suggestion in No. 42, August Term, 1882, upon which a second judgment was entered of $16,532.95, with interest from April 26, 1880, in favor of certain plaintiffs in specified sums. On May 11, 1883, another suggestion was filed by attorneys for all the other plaintiffs, except one, marking portions of the judgment of October 7 to their use also. On October 7, 1882, the real estate, from which the fund in question arises, was sold by order of court, and the sale was confirmed on November 20, 1882. On April 26, 1883, Messrs. Wolf and Ott were appointed auditors to distribute the fund, and held their first meeting on May 12. On June 4, Geo. Winters filed a paper in No. 42, August Term, 1882, appearing to the sci. fa. waiving exception to any variance between that writ and the record upon which it was issued, and also to previous entries of judgments thereon, and confessing a third judgment of revival for $16,632.95 with interest from April 26, 1880, for the use of the several equitable owners of the original judgment according to their respective interests as set out in the assignment of Oct. 12, 1878.

The State Bank held a second judgment against Winters for $10,264, entered October 12, 1878, which was a lien on his real estate when the same was sold in October—November, 1882, and claimed the fund, which amounted to $7,141.38, on the ground that the lien of No. 145,

August Term, 1877, had been lost by failure to revive. Mrs. Dietrich and Mrs. Creamer claimed to be paid in full, asserting that they had revived that judgment for the respective interests therein by sci. fa's. 42 and 43, August Term, 1882, and the other equitable plaintiffs claimed that the entry of judgment on October 7, 1882, for $16,532.95, and the confession of judgment by Winters on June 4, 1883, revived the original for the full balance due for the benefit of all, and that the fund should go to all, pro rata, to the exclusion of the second judgment of the Bank. The auditors awarded the fund to the Bank, holding that sci. fa's. 41 and 43, August Term, 1882, and the subsequent proceedings referred to, did not continue the lien of No. 145, August Term, 1876, either in whole or in part, and the correctness of this ruling is the matter for determination.

Several questions of some difficulty are presented by these facts, and in reaching a conclusion we have been much assisted by the able report of the auditors and the arguments at bar. We will consider these questions in what seems to us the most convenient order.

(1) What effect, if any, is to be given to the confession of judgment entered June 4, 1883? It is urged that it must be treated as curing any defect in the sci. fa., though the judgment for $16,532.95, entered October 7, 1882, of which this confession is meant to be a ratification, was entered against the protest of Mrs. Dietrich's counsel, who claim the right to revive for her separate interest alone, and denies that the sci. fa's he issued have any defects to be cured, and although the confession was obtained by counsel representing other claimants than Mrs. Dietrich. But we think this protest is entitled to consideration. No other of the persons to whom the original judgment was assigned seems to have joined in the proceedings begun by Mrs. Dietrich and Mrs. Creamer, and, if they had the right to proceed separately, and have by diligence acquired priority, certainly the defendant could not be allowed, upon his own motion merely, or upon that of other persons, to deprive them of precedence. Can the State Bank, a subsequent judgment creditor, also object to the confession, as an attempted ratification of the judgment of October 7, 1882, or considered as an independent act? Under the circumstances, we think it has a standing to be heard. It must be remembered that the defendant's property was sold in 1882; the sale was confirmed on November 20 of that year, and we think the rights of creditors could not be disturbed after that date, at latest. The defendant's title was then transferred to the purchaser, his land was then turned into money, and the liens upon it were then divested and became claims upon the fund. If the Bank's judgment was then the first lien, or prior to all others except Mrs. Dietrich's and Mrs. Creamer's, it certainly can be heard to object to a proceeding, the result of which might be to take from it a fund, to part or all of which they were entitled. If the lien of the original judgment was gone, in whole or in part, by reason of a failure to revive, it surely could not be restored, as against the Bank, by the defendant's declaration that he wished it to continue, especially if, as we think, the rights of the lien creditors were fixed at latest by the confirmation of the sale. Suppose no fi. fa. at all had issued; in that case the lien of the original judgment, would, of course, have ended, as against the Bank, when the five years expired, (Bank *v.* Fitzsimmons, 3 Binn. 342; Styer's Appeal, 6 H. 86; Fulton's Estate, 1 Sm. 204; Mellon's Appeal, 15 Nor. 478; and, as against it, no subsequent action of the defendant could have restored it. A similar result must follow if the sci. fa's which did issue were not effective to continue the lien; if they did continue it, the defendant's confession of judgment was unnecessary, for the mere issuing of a proper sci. fa. without service or judgment thereon would be sufficient for that purpose (Lichty *v.* Hochstetter, 10 Nor. 444; Kirby *v.* Cash, 12 Ib. 505;) if they did not continue it, he could not take away from the Bank a legal advantage to which it had become entitled by reason of the negligence of prior judgment creditors. The confession is really an attempt, on behalf of certain parties in interest, to amend defects which they admit to exist in sci. fa. No. 42, August Term, 1882, considered as a sci. fa. to revive the whole judgment; for it was not needed to continue the lien of the original if the sci. fa. had been good (see cases

above cited;) and, for the reasons stated, we think the attempt must fail.

(2) This brings us to the second question, viz.: Did the sci. fa. issued by Mrs. Dietrich, and the subsequent proceedings thereon, excluding the confession of judgment, avail to continue the lien of the original in favor of all the persons to whom it was assigned? Here, again, it is urged, that the Bank cannot object to any irregularity of the proceedings, or the auditors go behind the judgment of revival of October 7. But the question is not of this character; it is a question of lien, whether the judgment on the sci. fa. is the original judgment so continued as to preserve its priority, or whether the latter has lost its place by lapse of time without revival. This can only be determined by inspection of the record, and such an examination it is clearly proper for a subsequent judgment creditor to require, and for an auditor to make. (Edward's Estate, 2 Pears. 58-9.) It is necessary, therefore, to consider the sci. fa. issued by Mrs. Dietrich, and determine its effect.

A sci. fa. to revive must substantially identify the original document as to parties, date and amount. Its purpose is to give notice that the lien of the original is to continue, and the original must, therefore, be clearly pointed out. It is not enough to correctly name the parties, or the parties and the date, or the parties and the amount, alone, for, in either case, it might well be that another judgment in another proceeding might be meant; but where parties, date and amount together appear with substantial correctness, it is held that sufficient marks of identity are present. The following cases show the necessity for correctly reciting the original judgment: Brannan *v.* Kelly, 8 S. & R. 481; Black *v.* Dobson, 11 Ib. 94; Walker *v.* Pennel, 15 Ib. 68; Williard *v.* Norris, 2 R. 62; Arrison *v.* Com., 1 Watts 380; Eichelberger *v.* Smyser, 8 Watts 181; Grennell *v.* Sharp, 4 Wh. 344; Dougherty's Estate, 8 W. & S. 189; Richter *v.* Cummings, 10 Sm. 441. The necessity for a definite legal rule on this subject is apparent. The question being one of notice, if no rule existed, each case would stand by itself, and different courts would certainly hold different views as to what was sufficient. Even as it is, there is some room for uncertainty, since *substantial* correctness in the three essentials is all that is required; but this qualification must exist to prevent valuable rights from being sacrificed to technical and formal objections. What now is the case here? As to the parties, in the original judgment was in favor of the State Bank against George Winters; the sci. fa. describes it as recovered by "the State Bank for the use of Mary J. Dietrich," against "George Winters, and Peter K. Boyd, assignee of George Winters, terre tenant, in possession, defendants." As to the date, the number and term correctly recited, and no variance in this respect is alleged. As to the amount, the original was for $28,120.72, and the sci. fa. describes it as recovered for $1300.00, in this and the other particulars exactly following the praecipe. These are certainly variances, and if they are substantial we must hold that the lien does not continue. It cannot be doubted that on the plea *nul tiel record*, they would be fatal; but we hesitate to apply so strict a rule as there prevails in favor of a subsequent judgment creditor whose money was not advanced after the sci. fa. issued. He has done nothing on the faith of the record; and asserting a strict legal right without equity, cannot complain if we insist that his right shall clearly appear as a matter of substance and not of form alone. When it does not appear, however, he is of course entitled to its benefits.

The first variance complained of we regard as of no consequence. The legal plaintiff is properly named in the sci. fa. and the addition of Mrs. Dietrich's name, we think, may be treated as a surplusage. The second variance is of more importance, but we would hesitate to hold it fatal if it stood alone. Coupled with the third, the difference in the amount, it has more weight, as indicating that the sci. fa. and the original were based upon different transactions; but we express no opinion on its affect, because we cannot avoid the conclusion that the difference in amount must be regarded as substantial. We are now considering whether this sci. fa. can be held to revive the *whole* balance due on the original, and in that aspect of the case, we are forced to say that the variance is fatal. The original to be revived was for $28,120.72; the sci. fa. describes *its* original as being for $1300.00. What connection can be discovered between the two? Nor is this a mere clerical mistake, for when judgment is taken, it is for $1,229

18, reached by credit and calculation upon a principal of $1300.00, and in no way referring to the larger sum. If sci. fa's to revive must substantially recite the amount of their originals, this one fails to do so, and the lien of its original was not contiued—at least, not as to the whole amount.

If this variance is fatal, its effect could not be avoided by the judgment entered on October 7, 1882. This presents the anomaly of a judgment for $16,532.95 on a sci. fa. which recited an original of only $1300.00, on which there was a credit of $341.06, and upon which there was already a judgment of $1229.18. Moreover, this judgment of October 7 was entered upon the suggestion of counsel for other claimants than Mrs. Dietrich, and against the protest of her own attorney. If she had a right to a separate sci. fa. for her own interest, certainly other claimants could not interfere with it after judgment; if she had no such right and her writ must be held to be upon the whole judgment for the benefit of all, we have already decided that the sci. fa. she did issue was bad and failed to continue the lien of the whole. It certainly could not, in any event, support a judgment for over $16,000.00. In addition to this the judgment of October 7, 1882, was unnecessary, if sci. fa. 42, Aug. T. 1882, was good, for, as we have seen, the mere issuing of a proper writ continues the lien.

We say nothing as to our power to have amended there proceedings, if applied to in time. Such an application was made on the argument of these exceptions, by the counsel who directed the judgment of October 7, 1882, but we think it is too late. The lien, considered as a whole, is gone, the land is sold and the fund in court. How can we now amend substantial variances, when the effect would be to alter valid existing rights to the money? Neither is any amendment asked by Mrs. Dietrich; and, we repeat, if she had a right to separate a sci. fa., we could not, upon the motion of others, amend away her priority. The probable explanation of this singular record is, that all the equitable plaintiffs except Mrs. Dietrich and Mrs. Creamer were negligent and allowed the five years to elapse without action, and that, afterwards becoming aware of their situation, they endeavored to avail themselves of a writ which was not intended for their benefit, and, hence, was not so framed as to support their right.

Another argument may be briefly noticed. It was urged, that the mere issuing of a sci. fa., without more, continues a lien, and that, as a sci. fa. issued here, it is enough, although the judgments upon it are admitted irregular. This supposes that the issue of any sci. fa. is sufficient, but it need hardly be said that the cases, which hold the issuing of the writ to be enough, mean a proper writ. If it is substantially defective it fails.

(3) The final question is, whether Mrs. Dietrich and Mrs. Creamer had the right to issue separate sci. fa's for their respective interests, and, if also, whether they issued proper writs. The case of Peterson *v.* Lathrop, 10 Cas. 223, decides that an equitable plaintiff may issue a sci. fa. upon the original judgment claiming to recover only his interest therein, and that, in such case, the judgment of revival should only be for the amount he claims. It does not decide that separate sci. fa's may issue for each interest, although the language of the court indicates that the other equitable plaintiffs might afterwards take *some* action upon the original judgment. But the language is as much applicable to an execution thereon for their interests as to a sci. fa. to revive, and the point was not raised by the facts or necessary for the decision. Neither is it neccessary here, for the reason that these two writs are quite as objectionable, when considered as an attempt, to revive separate interests, as we have found one of them to be considered as an attempt to revive the whole. They are just as varient in one respect as in the other. They do not, as in Peterson *v.* Lathrop, correctly recite the original, the interest of the equitable plaintiff therein, and claim to recover this interest and share, so that the identity of the original clearly appeared, although the claim of the equitable plaintiff was limited to his own interest therein; but are in the common form, based on alleged originals of $1300 and $340 respectively, and, for the reasons already given in considering Mrs. Dietrich's writ under another aspect, cannot continue the lien, even in part. Both writs were alike and neither is good. The exceptions are dismissed, the report is confirmed, and distribution decreed in accordance therewith.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, SEPTEMBER 27, 1880. No. 30

ORPHANS' COURT.

Squibb's Estate.

Executor—Services of—Renting of Property.

Where an executor is compelled to rent the decedent's real estate, and keep the property in repair, he is entitled to a reasonable allowance for these extra services.

But where part of such rent is lost through his negligence in not requiring security from the tenant, he is properly surcharged with the amount so lost.

Exceptions to Auditor's Report.

The report of the Auditor, James Kell, Esq., is as follows:

The auditor finds the following facts, to wit: Caroline E. Squibb, the said decedent, died September 20, 1878, having made her will dated September 14, 1877, by which she gave to her daughter Mary Jane Myers, the exceptant in this case, certain household furniture absolutely. All the rest of her estate real and personal she directed to be sold and the proceeds of the sale thereof to be invested for the use of said Mary Jane. The testator authorized the Executor to pay to her said daughter of the principal of the estate from time to time "to make her comfortable."

The estate of the testator at the time of her death consisted of a small quantity of personal property, and a tract of land containing about eighty-seven acres, situated in Warrington township.

At the time the account under consideration was filed, to wit: June 3, 1882, the Executor had not sold the real estate, but had leased it from year to year for rent in money payable annually. The said account of the Executor embraces the personal estate of the decedent and the rent received by him for the land, the whole amount with which he charges himself is $374.39 and the sum of the credits is $391.44 showing a balance due the accountant of $17.06.

To this account the following exceptions were filed, on behalf of Mary Jane Myers, the legatee, to wit:

I. That the accountant has not charged himself with all the assets that came or should have come to his hands.

II. That he is not entitled to credits Nos. 32, 33, 34, 39, 40, 42, 43, 45, 46, 47, 48, 49, 50 and 51, as claimed.

The exceptant and legatee was living with her mother, the testatrix, on the premises referred to, at the time of the death of the testatrix, but left the place soon after.

It is in evidence that she did not desire that the land should be sold until she would try how she would like living among strangers. The Executor made an effort to sell it at public sale sometime in 1881, but the purchaser failed to comply with the terms of sale and it remained unsold.

The land in question is the same place on which George Squibb and his wife were murdered in 1866. It is in evidence that the land is very thin and poor, not more than forty acres of it fit for cultivation, and that the buildings were old and delapidated.

The executor testifies that he found it very difficult to rent the place owing to the condition of the house and buildings, and also owing to the fact that it was the scene of the Squibb murder, people having a dread or apprehension of evil associated with the place, making it an undesirable place to live. He says repairs were necessary particularly to the hog pen, that being a building necessary to the proper use and occupation of the land, and he expended $49.96 in the purchase of material and paying for the work in making the repairs. He also purchased clover seed to the amount of $4.50 and sowed it on the land. The credits in the said account for repairs and the clover-seed are all excepted to.

Although it may not be within the duties and authority of the executor under the will to repair buildings and sow clover

seed on the land, yet being unable to sell it he had to lease it and in the opinion of the auditor he was justifiable in making necessary repairs. The evidence does not show that the charge for materials or work done in repairing are in excess of what they are worth.

The testatrix was afflicted with a dropsical affection, and her physician Dr. Trimmer, had occasion to "tap" her repeatedly and drain water from her abdomen. In some dozen of these operations Dr. Trimmer was assisted by Harvey Bell, the accountant at the request of the testatrix. Mr. Bell had to go about five miles from his home to Mrs. Squibb's place each time of the "tapping." For these special services he charges $8 and takes credit for the same in his said account. This charge does not seem to be excessive for that kind of service.

The accountant takes credit "for services attending the real estate" $12.00, and "allowance" $18.00 to both of which credits exceptions are taken. The services, for which $12.00 are claimed, are about the same for which $18.00 "allowance" are claimed."

Credit is taken in the account for these several sums of money paid to Mary Jane Myers in 1881. The money was not paid into her hands by the accountant, but it was left, with Edward Miller, a near neighbor to Mary Jane, for her, and she received it from Miller. In April, 1882, the accountant again left $10.00 for her at Millers. The last mentioned money she had not received at the time of the hearing before the auditor. The auditor has discovered no sufficient reason for exceptions to these four last mentioned credits.

It was owing to her infelicity of temper, and a want of disposition to accommodate her on his part, that the money was not paid into her hands by the accountant. But the money was left with a neighbor near to where she lived, and she got it all but the last payment, and could have got that sum also at the same place she got the former payments, but for her hasty leaving Miller's place on the occasion of her going there the last time before she was heard by the auditor.

In the opinion of the auditor the accountant should not be allowed credit for the $12.00 "claims for services attending to real estate," and the auditor therefore sustains the exceptions to credit No. 51, but does not sustain any other exceptions to the credit side of the said account.

The accountant charges himself with $60.00 rent for 1879; $38.85 for 1880 and $40.00 for 1881.

He had a written contract with the lessee for 1880, the rent to be paid according to the lease is $50.00, but the lessor failed to take security for the rent and therefore lost part of it. He says he has lessee's promissory note for $11.15, the balance of the unpaid rent for 1880, but he says the lessee is wholly irresponsible financially. This balance of rent was lost through the negligence of the accountant. He undertook to lease the real estate of the testatrix and is liable for all rent that he should have received under the lease. The auditor therefore surcharges the accountant with $11.15 balance of the rent of 1880. Circumstances over which the accountant had no control, relieve him in the opinion of the auditor, from liability for more than $40.00 rent for 1881. He seems to have done the best he could for that year after the tenant disappointed him. The tenant in possession for 1880, had agreed to remain for the year 1881, but changed his mind in the spring of 1881 when it was too late to obtain good tenants or lease on favorable terms, and the accountant had difficulty in leasing the place to any one.

The testatrix bequeathed to her daughter Mary Jane Myers, certain articles of household furniture, &c., mentioned in her will, which were appraised and delivered to the legatee and her receipt taken for the same by the accountant.

He charged himself with the appraised

value of the same bequest but omitted to take credit for the same amount in his account.

The omission was not discovered until the account was before the auditor on exceptions and on application the court enlarged the powers of the auditor that he might state a correct balance on the account. The appraised value of the said bequest was $17.00. This sum is therefore added to the balance due the accountant.

The balance due the accountant on the account as stated and filed is $17.05. The balance should have been $17.05 plus $17, to wit: $34.05. But the auditor in setting the exceptions surcharges the accountant with the balance of rent due for 1881, and unpaid, to wit: $11.15. And sustains the exception to the item No. 51 in the credits taken in the account "claims for services attending real estate," to wit: $12.00. The amount of these two items, to wit: $23.15 deducted from the balances on the account as stated by the auditor, shows a balance due the accountant of $10.90.

The negligence of the accountant, in the opinion of the auditor, was not so gross as that he should pay the the costs of the audit. The auditor therefore charges the same to the estate of the decedent.

The following exceptions were filed on behalf of Mary Jane Myers:

1. The auditor erred in charging the costs of audit to the estate of the decedent; which is virtually the same as punishing the exceptant for the default of the accountant; she being the sole legatee.

2. In not directing Henry Bell the defaulting accountant to pay the cost of audit.

And the following on behalf of the accountant:

1. The auditor erred in disallowing the credit of $12.00 for services attending the real estate.

2. The auditor erred in surcharging the accountant with the balance of the rent for 1880 amounting to $11.15.

H. L. Fisher, for exceptant.

W. C. Chapman, for accountant.

September 24, 1883. WICKES, P. J.—The auditor erred, we think, in surcharging the executor with twelve dollars claimed in his account "for services attending to the real estate."

The testator directed the property sold, the sale was however deferred in the first instance, at the request of the exceptant, the only person save himself interested in the estate.

The delay extended over a period of several years, and during all this time, the accountant looked after the property. It was according to the testimony a most undesirable farm—the buildings delapidated—the soil impoverished, and the place itself associated with a horrible murder committed there some years ago. All this, it is said, rendered it extremely difficult to procure tenants, and added to the ordinary trouble involved in the supervision of a farm.

For this the accountant charges twelve dollars—a sum which can scarcely be said to be excessive. The auditor says "the services are about the same for which the $18.00 allowance are charged."

There is nothing to show that these services are surchatged, or intended so to be, in the "allowance." Why then shall not the accountant be paid this amount—the services were rendered and the charge is moderate, and we think ought to be permitted to stand.

The other item with which the auditor surcharges the accountant, is $11.50 uncollected rent for the year 1880. He finds the accountant negligent, but the negligence seems to have consisted in not collecting the balance of rent. But there is nothing in the evidence to show the rent could have been collected by any amount of vigilance.

If there was any negligence in the matter, it was in not requiring security when he leased the property. He seems to have

had but little choice of tenants, but he ought to have made an effort to have the rent secured. This he seems not to have done, and we shall therefore not disturb this finding of the auditor. The auditor was quite right in charging the costs of the audit to the estate. There is nothing in the facts developed before him that would have justified a different disposition of them.

And now, to wit, September 24, 1883, the exceptions filed by Mary J. Myers are dismissed. The first exception filed by Harvey Bell, the accountant, is sustained, the second dismissed, and the report confirmed, except so much as surcharges the accountant with twelve dollars.

O. C. of Delaware County

Green's Estate.

Sale of lands under the Price Act—Is proof of the existence of "debts not recorded" necessary?

Under the Act of April 18, 1853, Sec. 2, the court may decree a sale of lands which are subject to the lien of debts not of record, although no such debts are actually known to exist.

Petition for order to sell lands of the decedent which are subject to the lien of debts not of record.

The petition was referred to D. M. Johnson, Esq., Auditor, who reported as follows:

From the testimony the Auditor is of opinion, and finds that the statements set forth in the petition are true.

All parties in interest appear by the petition, to desire a sale of the properties mentioned therein.

It only remains therefore for us to consider the power of the court to decree a sale under the circumstances set forth in in the petition, to wit: "That the said estate is subject to the lien of debts not of record," &c.

This being a question of law, the Auditor refers to Sec. 2 of the Act of April 18, 1853, (Price Act) in which the court is given jurisdiction to order a sale (1) "whenever a decedent's estate is subject to the lien of debts not of record."

Should evidence of the existence of debts not of record be presented to the court, or is the theory that for five years lands are thus subject, sufficient to give the court jurisdiction?

It is scarcely necessary to cite authorities to the effect that "the law being beneficient and remedial is not to be so construed as to defeat its main intent."

"But when the (private) sale decreed is for the reason set forth in the 2d Section, that is that the "decedent's real estate is subject to the lien of debts not of record," it would be to make the Act nugatory to defeat the very purpose for which the application to court is made. A (private) sale may take place for any and all the purposes enumerated in the 2d Sec., if it be to overcome the disability of person, or to purge the title of its trusts or limitations, that end may be reached by *either* mode of sale, and it should not be less so when the object of sale is to remove the lien of the *unknown general* debts of a decedent, having a lien for five years after his decease when that is the *expressed purpose*." Price on the Act relating to Real Estate, page 131.

Also "whenever a decedent's real estate is subject to the lien of debts not of record;" that is, during the five years after his decease, for which time all his real estate is subject to the lien of all of his debts; and *theoretically so subject though no debts be known to exist*. *Ibid*, page 97.

See Greenawalt's Appeal, 1 Wr. 97, where the question was partially considered.

In re Hannah H. D., and Howell Pierce, minors, 7th Phila. 475, opinion by Allison, J.: "There may in fact be no known debts, but debts there may be, without the knowledge of the heirs or of a proposed purchaser; and this uncertainty would necessarily depreciate the price that would be obtained for the property." * *

"But if in fact it should be found at the expiration of three years there are no debts to be paid, there is yet a purpose contemplated by the Act, to be subserved by a decree of sale, namely, to discharge the lien of debts which cannot with legal certainty be known *not to exist*, and to pass the property to the purchaser discharged of any possible claim," &c., &c.

The court therefore appears to have full power under the present petition to decree a sale, and the auditor is of opinion that a sale of the premises mentioned and described in the petition is expedient and for the interest and advantage of those interested in the premises.

Sept. 17, 1883. CLAYTON, P. J.—The report is confirmed and order of sale granted.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, OCTOBER 4, 1883. No. 31

SUPREME COURT.

Peoples' Bank of Wilkesbarre v. Legrand.

An indefinite or uncertain extension of time for the payment of a note, which does not tie up a creditor's hands, will not discharge an endorser.

A bank is not obliged in favor of an endorser to appropriate money deposited by the maker of a note, one of its customers, towards the payment of the note after it becomes due.

If, however, it has funds of the maker in hand at the time of the bringing the suit against the endorser he may avail himself of the maker's right to set-off.

Error to the Court of Common Pleas of Luzurne county.

The following was the agreement of parties as to the facts established by the evidence, in the nature of a special verdict.

It is agreed that the evidence establishes the following facts, viz.:

1. That Legrand the defendant, endorsed Lowenstein's note for $2500, which was discounted by plaintiff, not paid at maturity, and duly protested with lawful notice to said Legrand, endorser

2. That Lowenstein was a depositor of large amounts in the plaintiff's bank, at the time said note was discounted, to wit, May 15, 1875, and at the time it was protested, to wit, August 16, 1875.

3. That suit was brought by the bank against Lowenstein, November 13, 1875, and judgment obtained January 13, 1876, Suit against Legrand was begun Dec. 8, 1876.

4. That Lowenstein continued to do business with the bank as a depositor until Dec. 8, 1876.

5. That after suit was brought against Lowenstein, he asked the president of the bank for time to pay the note, and agreed to pay ten per cent. interest thereon, and to continue doing business with the bank, but no particular time was specified or agreed upon.

6. That Lowenstein had not sufficient funds in the bank to pay the note at the time it matured, but that afterwards, and after the agreement aforesaid, he had at several different times between the maturity of the note, August 16, 1875, and the closing of his account, December 8th, 1876, sufficient funds there to pay the note.

7. That the amount due upon the note, May 18, 1882, is $2,977.45.

The points reserved by the court are the following:

1. Was Legrand entitled as the surety of Lowenstein to have the money deposited by the latter in the plaintiff's bank, applied to the payment of the note, and was it the duty of the bank so to apply those deposits?

2. Had the bank the right to apply the money deposited by Lowenstein, to the payment of the note, under the terms of the agreement on which he continued his business with the bank?

So agreed this 18th day of May, 1882.

The verdict of the jury subject to points reserved to the court was as follows:

Now, May 18th, 1882, the facts of this case being determined by agreement filed (see *supra*), the court direct the jury to render a verdict in favor of the plaintiff, for the sum of $2,977.45, subject, however, to the reserved points specified in the foregoing agreement of counsel, and reserving the right to enter judgment, *non obstante veredicto*, in favor of the defendant, if, upon consideration of those points, and the facts agreed upon, the court shall be of the opinion that judgment should be so entered.

Same day the jury do say they find in favor of the plaintiff for the sum of $2,977.45.

The following was the opinion of the Court below, Woodward, J., entering judgment *non obstante veredicto*.

From the voluminous statements filed in this case we content ourselves with a brief reference to two facts that are conclusive in their effect upon our mind.

1. That after suit was brought against Lowenstein, he made an agreement with

the president of the bank for an extension of time upon the note, on the condition that he should pay ten per cent. interest thereon, and should continue to do business with the bank as a depositor and otherwise.

2. That between August 16, 1875, the date of the maturity of the note, and December 8, 1875, the date of the closing of his account, he had on deposit in the bank sufficient funds to pay the note.

Under these facts we consider the law of the case to be properly stated in Miller v. Stem, 2 Penn'a St. Rep. and that the surety or endorsed is discharged—

1. By virtue of an extension of the time of payment, which was sufficiently definite to meet the requirements of the law, and

2. Because there was a valuable and sufficient consideration in the case.

Therefore judgment is now entered in favor of the defendant, and against the plaintiff, *non obstante verdicto.*

The specifications of error were—

1. The court erred in holding that the defendant was discharged by reason of the extention of time, as follows: "By virtue of an extension of the time of payment, which was sufficiently definite to meet the requirements of the law."

2. The court erred in entering judgment upon a point which was not reserved.

3. The court erred in directly judgment to be entered in favor of the defendant *non abstante verdicto.*

Opinion by Green, J. May 25, 1883.

We assume that the matters contained in the fifth clause of the agreement of facts signed by the parties constituted an actual agreement, though it is not so stated. The sixth clause, however, refers to the subject of the fifth as "the agreement aforesaid." As there stated, the agreement between the bank and Lowenstein, extending the time for the payment of the note in suit, was indefinite, as "no particular time was specified or agreed upon." The learned court below held that the extension of the time of payment was sufficiently definite to meet the requirements of the law, and that it was founded upon a valid consideration, and therefore the endorser was discharged. We are not able to concur with the court as to the character of the agreement for extension of time of payment. Nothing is said about it in any other part of the paper, except the fifth clause, and there it is distinctly stated that no particular time was specified or agreed upon. The remainder of the clause speaks only of a proposition for more time to pay the note, an increase of the rate of interest to be paid, and a continuation of business by Lowenstein with the bank. We see no element of certainty in this as to the time when the note was to be paid. On the contrary, that time is essentially indefinite and uncertain, and there was nothing to prevent the bank from bringing suit on the note the next day after the agreement to extend was made. This being so, the endorser could, by paying off the note, demand its surrender, and commence an action immediately. This consideration brings the case clearly within the operation of the rule as stated in Miller *v.* Stem, 2 Barr 386, and the line of cases which have followed, and never questioned it. All the elements of the rule are thus presented in Henderson's Administrator *v.* Ardery's Administrator, 12 Cas. 451. "That a creditor, having a principal debtor and a surety, discharges the surety by entering into an agreement with the principal, which can be enforced at law or in equity, whereby he extends the time of payment for any indefinite period beyond that mentioned in the original contract, is proved abundantly by our authorities." In Miller *v.* Stem, the case turned upon this very question, together with an absence of consideration. On page 288 we said; "But mere consent to forbear for a loose and uncertain period does not tie up the creditors' hands."

And also: "To take away from the plaintiff a just debt in order to relieve a surety, justice requires there should be a clear, distinct agreement by the creditor, placed beyond reasonable doubt for a time certain or total forbearance, or forbearance for a reasonable time." In Brubaker v. Okeson, 12 Cas. 522, Strong, J., said: "Nothing short of an agreement to give time, which binds the creditor, and prevents his bringing suit, will discharge the surety." As we have observed, there was no agreement to extend the payment of the note in suit for any definite time, and therefore the bank was not prevented from bringing suit at any time, and the judgment of the court below must be reversed for this reason. Another point was made, however, though not determined by the court, notwithstanding it was reserved, which, if sound would still defeat the plaintiff's right of recovery. It grew out of the fact that Lowenstein continued to do business with the bank, and had at various times sums on deposit with the plaintiff sufficient to pay the note. It is contended that these funds, being within the power of the plaintiff, an obligation arose to appropriate them to the payment of the note as in favor of the endorser, and this not being done, the latter was discharged. We do not think so. While it is true that a bank is a mere debtor to its depositor for the amount of his deposit, and therefore, in an action by the bank against the depositor, on a note upon which he is liable, the latter may set off his deposit, yet we do not think the bank is bound to hold a deposit for the protection of an endorser of the depositor. A bank deposit is different from an ordinary debt in this, that from its very nature it is constantly subject to the check of the depositor, and is always payable on demand. The convenience of the commercial world, the enormous amount of transactions by means of bank checks occurring on every business day in all parts of the country, require that the greatest facilities should be afforded for the use of bank deposits by means of checks drawn against them. The free use of checks for commercial purposes would be greatly impaired if the banks could only honor them on peril of relieving endorsers, without an investigation of discounted paper. This question does not seem to have frequently arisen in the courts, but in three cases out of four to which we have been referred, the right of the bank to pay out the deposit of the party in default on his paper, without relieving the endorser, has been affirmed. Thus in Maryland, in the case of Martin v. Mechanics' Bank, 6 Har. & Johns, 235, in an action on an inland bill of exchange by an incorporated bank, as the holder of the bill which they had discounted before it became due against the payee, evidence was given that the acceptors of the bill on the day it became due, and for a long time before, and for several months thereafter, kept an account at the said bank by depositing, and from time to time checking out money, and that on the day the bill became due they had no money in bank, but that about a month afterwards a balance was struck between the bank and the acceptors, when they had a sum of money sufficient to have discharged the bill. *Held*, that the bank was entitled to recover the amount of the bill from the payee; that the conduct of the holders of the bill with regard to the acceptors, was not a waiver of their right against the endorsers, nor a release as to them; and, as between the holders and acceptors, there was no payment. The case was elaborately argued by counsel, and fully considered by court. It was held that a deposit of money in a bank by a regular depositor is not to be regarded as an appropriation by him of the money deposited to the payment of existing indebtedness of his, but rather for the mutual benefit and convenience of the bank and depositor, "according to the common course of business in our money institutions." On page

247 the Chief Justice said: "The mere placing money in bank on deposit by the Messrs. Woods had not of itself the affect to discharge the appellant from his liability as endorser of the bill; and the not diverting, by the plaintiffs, the money from the purpose for which it was so placed and received by them in bank, and applying it to the payment of the bill, was not more to the prejudice of the endorsers that their forebearing to sue the acceptors and did not amount in law to a waiver of their right of action against either of the parties? In Voss v. The German American Bank, 83 Ill. 599, it was held that where the principal on a note payable to a bank has funds on deposit in the bank after maturity more than sufficient to pay it, the omission of the bank to appropriate the deposit to the payment of the note will not discharge the surety. In New York, in case of the National Bank of Newburgh v. Smith, 66 N. Y. 271, it was held, that where, after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank, of an amount sufficient to pay the note, this does not of itself, as between the bank and an endorser, operate as a payment. In the absence of any express agreement or directions it is optional with the bank whether or not to apply the money in payment; it is under no obligation to do so. The case of McDowell v. The Bank of Wilmington, 1 Harrington 369, in the State of Delaware, holds the contrary doctrine; but we think the better reason is with the three preceeding cases, above cited. It is beyond question that the bank in the absence of any special appropriation of the deposit by the depositor, would have the right to apply a general deposit to the payment of any existing matured indebtedness of the depositor. But that privilege is a right which the bank may or may not exercise in its discretion. As before stated, a bank deposit creates a form of indebtedness of a peculiar and exceptional character. It is thus stated in Morse on Banks and Banking, on page 35: "The bank is under the obligation of honoring the customers' drafts and checks whenever the same are presented for payment; provided, that at the time of such presentment, the balance of the account, if then struck, would show a credit in favor of the customer, of funds on which the bank has no lien, sufficient to meet the sum called for by the check or draft. The contract so to honor the depositors orders is implied from the usual course of business. The deposit is made with the tacit understanding that the bank shall respond to the depositors' orders so long as there is sufficient balance to his credit." It may well be that special circumstances may exists in particular cases, which will convert into an obligation or legal duty, as to endorsers and others contingently liable, that which would otherwise be a mere privilege of the bank. Thus an original direction by the maker and endorser on the one hand, and the bank on the other, that general deposits of the maker should be applied in discharge of the endorsed paper after maturity, or possibly a course of dealing to that affect, might suffice to create such an obligation. But, in the absende of such circumstances and of special direction we think that general deposits, made after maturity of the depositor's obligation, are to be treated in the same manner, subject of course, to the option of the bank, as the same class of deposits made at any other time and before maturity; that is, according to the general usage and understanding prevailing in the commercial world. We fully recognized the rule that where a principal creditor has the means of satisfaction actually or potentially within his grasp, he must retain them for the benefit of the surety; but we regard the case of bank deposits as an exception to the rule. We are not prepared to say, and do not hold, that when the bank has funds of the maker in hand, *at the time of bringing suit*, the endorser

YORK LEGAL RECORD.

VOL. IV. THURSDAY, OCTOBER 11, 1883. No. 32

may not avail himself of the maker's right of set-off in defence. In such a case the equities of the maker touch the holder directly, and are available to the endorser. Such was the decision of this court in case of Sitgreaves v. The Bank, 13 Wright 362, and we know of no reason why that doctrine would not be as applicable to the case of a deposit as to any other form of obligation by the bank to the maker. But in the present case the doctrine is inapplicable, because at the time of bringing this suit, it does not appear that the plaintiff held any money of Lowenstein's on deposit. In addition to this, it was part of the agreement for extension of the time of payment between Lowenstein and the bank that he should continue to do business with the bank. If he could not draw out funds deposited, he could not do banking business, and we think there is a clear implication from the agreement for extension that Lowenstein was to be at liberty to draw against his future deposits, notwithstanding the dishonor of the note in suit. Such an understanding would operate against the right of the bank to appropriate such deposits to the payment of the note. In view of these considerations, we think the learned court below was in error in not entering judgment in favor of the plaintiff for the amount of the note and interest, on the point reserved, in accordance with the verdict of the jury.

Judgment reversed, and now judgment is entered on the verdict in favor of the plaintiff and against the defendant for $2,977.45, with interest from the date of the verdict, and cost of suit.

Earley's Appeal.

A borough has no authority to purchase a judgment so as to make it a set off against a judgment against the borough.

Article 9, section 7 of the Constitution, prohibits a borough from loaning its credit to any individual.

Appeal from the decree of the Court of Common Pleas of Luzurne county.

May 21, 1883. GORDON, J. On the 11th of September, 1879, a judgment was obtained by Roger Wood, for the use of M. C. Earley, against the borough of Pleasant Valley, in the sum of $476.93. On the 30th of August, 1880, a mandamus was issued for the collection of this judgment, which was returned served upon M. T. Hoban, the treasurer of said borough, who, for answer thereto, alleged that there was no money in the treasury. It seems that at the same time, Hoban, the treasurer, was the owner of two judgments against Early, No. 378 and 379 of May Term, 1877, which it appears, turned out to be worthless, because of the insolvency of the defendant. Then, on the 14th of June, 1882, the borough council, at a special meeting passed an ordinance directing the purchase of said judgments from Hoban, for the sum of $150. It does not appear, from this ordinance, for what reason or purpose these judgments were purchased, but Hoban, in his testimony, explains that he brought about the arrangement, and made the assignment, for the purpose of having them collected through the aid of the borough. It further appears that he agreed to indemnify it for any costs and expenses that might be incurred by its officers in the conduct of this business. The meaning of this transaction is easy of comprehension. The borough was to be used as an instrument for the collection of Hoban's judgments; hence, we find, that the next step which was taken, after the alleged purchase by the borough, was to obtain the rule to show cause why these judgments should not be set off against that which Early was endeavoring to collect from the borough, and this rule, the court below, on the 15th of July, 1882, made absolute. Granting, however, that these judgments were bought, and paid for, in good faith, and for the sole purpose of subserving the interests of the

borough, there yet remains this question to be disposed of, whence did this municipality acquire the power to purchase, the outstanding judgments, or other obligations, of its creditors? We confess that even with the help of the argument of the learned counsel of the appellee, we have not been able to solve this proposition. It does seem to us, that if a borough, city, township or county, may buy up the judgments, bonds or notes of its creditors, it may buy those of any other person, and may thus, in effect, become a broker or banker. But the evils which must, in the nature of things, arise from the exercise of such a power by the various municipalities of this Commonwealth, are so obvious, and the power itself so contrary to every idea that we, as a people, have hitherto entertained, concerning the constitution of these public corporations, that we may set it down as certain, that it accords not with the policy of our government, and that its exercise is therefore not allowable. But, as we have already observed, the facts of this case demonstrate that the borough is here being used as a mere instrument for the collection of the whole, or part of, Hoban's claim, against Early. Hoban, for this purpose, could not use the process of attachment, hence, as a substitute, a sale and assignment were resorted to, and in this manner he gets the borough's right of set-off; that is, he is credited with that right as against Early. But as this is clearly a loan of the credit of the municipality, it comes within the ban of the 7th section of the 9th Article of the Constitution of 1874, and we are therefore, compelled to pronounce against this carefully planned and ingenious scheme for the collection of a debt.

The decree of the court below is now reversed and set aside, and it is ordered that the appellee pay the costs.

QUARTER SESSIONS.

Q. S. of Adams County.

Road in Menallen Township.

Road Law—Recommittal.

A report of viewers which sets forth that the terminus of a new road was at a "post in the Middletown and Arendtsville road," will be re-committed to the viewers for amendment, with instruction to more particularly describe the location of the post.

In re exceptions to report of viewers *vacating* and supplying a portion of the public road leading from a point on the valley road in Menallen township, at line of lands of Burkhart Wert and Josiah Griest, to a point on the Middletown and Arendtville road, at a line of lands of Moses Raffensberger and Abraham Bushey in Butler township.

Mr. McCreary, for exceptions.

Mr. Swope, for report.

McCLEAN, P. J. The petition in this case instead of containing too little, may contain more than enough. The precedents and practice require that the petition should set forth distinctly the situation of that part of the road which the petitioners desire to have vacated, not the route or terminus of the substituted road, which are entirely for the selection and discretion of the viewers; Chartiers township road, 12 Wr. 514, *vide*, Road in Ross township, 36 Penn'a St. 87. Nelsons Mill road, 2 Leg. Opin. 54.

When we take up the Report we find the beginning of the substituted part distinctly enough stated, but not the ending. It was decided in Kyle's Road, 4 Y. 514. Tilghman, C.J., that no general rule can be laid down as to the definite points where a road shall begin and end being necessary to be stated in the petition. *Id certum est, quid certum reddi potest.* In the report we have the *terminus a quo*, the corner of the garden of Samuel Detrick and a *terminus ad quem*, the Middletown and Arendtsville Road. The latter was left to the judgment of the viewers.

The description of a road from the dwelling house of Matthew Miller to the public road leading from Carlisle to Har-

risburg, commonly called the Trindle Spring Road was held sufficiently certain; Tilghman C. J., S. & R. 36. In Bean's Road, 11 Casey 231, it is said when one terminus has been fixed, the courses and distances would have made the other terminus ascertainable, and reference is made to the Penn's Valley Road, 4 Y. 514, and the Matthew Miller Road, 9 S. & R. 35 above cited. Bean's Road was a public one. Thus the position taken by Mr. Swope in the argument is sustained. If there is a serious omission in the report the universal and proper practice is to recommit it to the viewers for such alteration as will make it perfect. New Hanover Road, 6 Harris 224. A report may properly be referred back to the viewers for such correction as it needs, at any time before final confirmment; Hilltown Road, *idem* 253.

In order then that the ending of the road supplied may be determinable from the record of the Quarter Sessions, the viewers must describe this terminus with sufficient precision, to enable the supervisors to locate it, when ordered to be opened; Bean's Road, *supra;* Chartiers Township Road, *supra*.

And now, to wit, September 25, 1883, Report recommitted to the viewers for particular description of the place of the post on the Middletown and Arendtsville Road.

Q. S. of Chester County

Commonwealth v. Neely.

A constable, who subpœnas witnesses for court, is entitled to charge, according to the Sheriff's fee bill, ten cents for each witness and four cents for each mile traveled.

Per FUTHEY, P. J.—The person intrusted with the service of subpœna is not acting in the character of constable, but rather as a Sheriff's officer, and cannot be allowed a higher rate.

Exception to taxation of bill of costs.

The facts appear by the opinion of the Court, which was filed Sept. 24, 1882.

FUTHEY, P. J.—The exception is to the allowance for serving the subpœna. The charge is made according to the constable's fee bill, which allows the officer fifteen cents for each witness subpœnaed, and six cents for each mile travelled. Where a subpœna, however, is the process of the court and is for the attendance of the witness thereon, the charge should be made according to the Sheriff's fee bill at the rate of ten cents for each witness subpœnaed; and four cents for each mile travelled. The person entrusted with the service of such a subpœna, is not acting in the character of constable, but rather as a sheriff's officer, and cannot be allowed a higher rate. For the service of subpœnas issued by a justice of the peace, the charge is properly made according to the constable's fee bill; but not for serving those issued by the Court or its officers. (Coleman *v.* Hess, 1 P. A. Brown's Rep. 274; Kepner v. Miller, 1 Ches. Co. Rep. 369.)

The Sheriff's and Constable's fee bills were formerly the same with regard to these items, but the Sheriff's fee bill of June 12, 1878, has reduced them.

The bill will be corrected by the clerk of the court.

COMMON PLEAS.

Dempwolf v. Pennsylvania Rail road Company

Negligence—Contributary—Stopping at Railroad Crossing.

Plaintiff in approaching a railroad crossing, stopped at a point somewhat remote from the track, (and from where he could not see the approaching train,) stopped, and failing to hear anything, drove on. There was a point nearer to the track where he could have stopped, but he failed to do so, drove on, and was struck by the train. HELD, That whether his failure to stop at the place nearer to the track was such concurring negligence on his part as would prevent a recovery, is a question for the jury.

Motion to take off compulsory nonsuit.

H. L. Fisher for motion.

R. E. Cochran, Horace Keesey and V. K. Keesey contra.

October 8, 1883. WICKES, P. J. I am of opinion that the question of negligence on the part of the plaintiff, ought under the circumstances of this case, to have been submitted to the jury. There is no inflexible rule in this State, which fixes the distance at which a traveller must

stop, before crossing a railroad track. Not to stop at all to look and listen, is negligence *per se;* but that was not the case here. The plaintiff did stop and listen, (he could not see the track), at a point somewhat remote. There was space to stop nearer the track, which he failed to do. Whether this failure was such concurring negligence on his part as to prevent a recovery, is I think a question to be determined by a jury; Penn'a R. R. Co. *v.* Ogier, 11 Casey 60; North Penn'a R. R. Co. *v.* Hileman, 13 Wr. 64.

We therefore make absolute the rule to take off judgment of non-suit.

Stone v. Leiberknecht.

Mechanics lien—Continuity of purchase.

The defendant finished his building on a certain date, according to the original plan. Five months afterward he changed the flooring, and put in new material for the old. HELD, that a mechanics' lien filed three months after the change of flooring, being eight months after the first completion of the building, was too late.

October 8, 1883. WICKES, P. J. Under the testimony submitted we think the mechanics' lien creditors are without a case.

The defendant has distinctly stated that his tobacco shed was finished in August 1881—"finished according to my original plan"—"finished to all outward and inward appearances," are his expressions. The mechanics lien was not entered until April 1882, more than six months afterwards. That the defendant in January 1882, determined to *change* the flooring in the cellar, and did purchase and substitute new material for the old he had placed in it according to his original plan, does not give to this lien precedence of the plaintiff's judgment. The Act of April 14, 1855, (Purdon 1034, pl. 46) relied upon to sustain the rule, does not apply. Its purpose was merely to link together the items of an account where there was no contract for the whole, or no order which would embrace the whole within a single undertaking, but always when the materials are furnished *continuously* to the same building; Diller *v.* Burger, 18 P. F. S. 432.

We are of opinion under all the circumstances of this case the items in the account of January 12, 1882, are not sufficient to save the lien under the Act of 1855. We therefore discharge the rule.

ORPHANS' COURT.

Aten's Estate.

In the absence of any proof that a guardian has made proper use of a fund on an account of his administrator, his estate will be charged with interest from the date of its receipt until the date of his death.

In such case a guardian must be at least treated as a borrower of the fund from the date of the receipt.

Exceptions to account of guardian of Alfred H. Aten, as filed by the administratrix of the guardian.

August 6, 1883. RHONE, P. J. The guardian having died, his account was properly filed by his administratrix, and she could, of course, only state such an account as she could make up from memoranda left by the decedent. She, therefore charged the decedent's estate with the sum of $795.37, claiming $59.00 credit for expenses, showing the guardian's estate endebted $746.67. The exceptant claims that to this sum interest should be added from January 2, 1880.

The guardian received from the United States government January 2, 1880, a pension for the amount above stated. It is not shown that he has either expended any part of this sum for the benefit of his ward, or that he has invested it for his benefit, or even that he had it on hand at the time of his death. It needs no argument, or authority, then to conclude that his estate is liable for interest from the time the money was received. He could not, if living, object to being treated as a borrower of the fund at least, although the law would call the transaction a crime, perhaps.

We, therefore, surcharged interest from January 2, 1880, to February 1, 1882, the date of the guardian's death, which amounts to $93.33, which added to $746., 67, amounts to $840, for which sum we enter judgment against the estate of the decedent and in favor of the ward, with the costs of this proceedings.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, OCTOBER 18, 1883. No. 33

ORPHANS' COURT.

O. C. of Luzurne County

Ross' Estate.

As a general rule, nothing earned by a corporation can be regarded as profits until it shall have been declared to be so by the corporation itself, acting by its board of managers. The fact that a dollar has been earned gives no stockholder a right to claim it until the corporation decides to distribute it as profit; Morris' Appeal, (2 Norris 266 followed.

The income or dividend from bank stock was bequeathed to the testator's widow for life. She died June 23d, and a dividend was declared on the 29th of the same month. HELD, that her estate was not entitled to any portion of the same.

Apportionment of dividends on stocks to legatees, etc.

August 6, 1883. RHONE, P. J. The testator bequeathed to trustees certain bonds, 'and also one hundred shares of the stock of the Second National Bank of Wilkesbarre, upon the express condition that they, the said trustees, shall collect and receive the interest, dividends and profits to accrue upon the said bonds and stock as the same shall become payable, and pay over the same to my said wife, Ruth T. Ross, during the whole term of her natural life,' and upon her death then the said trustees "shall have and hold the said bonds and stock absolutely, equally to be divided between them." The widow died June 23, 1882, and on the 29th day of the same month the said bank declared a semi annual dividend on the stock amounting to $300.

The question now is whether the said dividend belongs to the estate of Mrs. Ross or to the trustees. The question has been raised by counsel on citation to the trustees to account, and their answer that the dividend does not belong to the said estate, but to them personally under said will.

The bequest to the widow is not strictly annuity, but is of the accruing income or dividends on the stock, and yet the rules of law relating to the rights of annuities for life are to some extent applicable. We have come to the conclusion that the money does not belong to the estate of the widow. "As a general rule, nothing earned by a corporation can be regarded as profits until it shall have been declared to be so by the corporation itself, acting by its board of managers. The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as profit." Morris' Appeal, 2 Norris 269. This case belongs with Biddle's Appeal (11 W. N. C. 244) and Vinton's Appeal (*ibid*, 246), and the cases there cited, which discuss the question of what is capital and what is income where there has been an increase in the value of stock, bequeathed in terms similar to those in hand. This class of cases seems to show that each one is decided on its own particular circumstances, rather than on any broad, well settled rule of law. In Earp's Appeal (4 Case, 374) Lewis, C. J., says "that there is a general rule of law which forbids apportionment, in respect of time, in cases of periodical payments becoming due at fixed intervals, but this rule is founded on convenience, and not on the equitable rights of parties in interest. It is, therefore," says he, "subject to exceptions wherever the purposes of justice require the correction of injuries arising from the uniformity of the law." He then cites several exceptions to the rule, and adds, "In ordinary dividends on stock, periodically declared, the intervals between the time of payment are so brief, and the sums divided so small, that no great injustice can be done in following the rule of convenience, while on the other hand, the necessity for it is usually very strong, arising from the difficulty of ascertaining the exact amount of profits during fractions or the period." An apportionment was made in that case only because of the long accrued income, and the same was done in McKeen's Appeal, (6 Wright 479) for the same reason.

As we have before said, in cases like this the dividend or income is not due at *fixed intervals*, nor does it accrue from day to day, so as to bring the widow within the exception to the general rule laid down in Blight v. Blight, (1 Smith 420) and cases there cited. That is to say, if the bequest to her had been a definite sum, payable at fixed intervals, or if it had been the income of a fund drawing a stated rate of interest, her estate would be entitled to such share of the same as had accrued to the date of her death, but under this will she was only to have such dividend as her trustees should collect when "payable',' hence there was nothing ever due her until the dividend was declared. See Stewart v. Swain, 7. W.N. C. 407. For the statutory alteration of the common law rule, see Williams on

Executors, Am. Ed. 1877, p. 706, *et seg.* See also note (*n*) p. 913.

The proceedings in this care are, therefore dismissed at the cost of the petitioner.

COMMON PLEAS.

C. P. of Adams County

Slaybaugh's Case.

Married Woman—Petition for Separate Earnings—Contents of.

A petition by a married woman, to secure her separate earnings, under the Act of 1872, must set forth what earnings the petitioner has or expects to have, or what business she expects to engage in, or how the earnings she desires to secure are to accrue.

Petition of Mary Ann Slaybaugh for benefit of Act of 3rd of April, 1872, and answer of her husband.

October 16, 1883. McCLEAN, P. J. For some time passed, I have been dissatisfied with the form of the petition used in such cases as this, in this Court and I am of the opinion that the present application affords an appropriate opportunity of calling a halt to the practice. The petition could not well be briefer than this. It could not well convey less information. We have the name of the woman, whose wife she and where he lives, but what earnings she has or expects to have, what wages for labor she has or expects to have, we know nothing about whatever. Does she intend to leave the home and service of her husband, to abandon her children to go into some other family, to go on some other farm, to go into some shop or store or office or manufactory? What salary has she been receiving, or does she expect to receive? What property does she own or expect to own? Has she horses and cattle, land or money, merchandise or stocks? What business is she engaged in or contemplates engaging in? These inquiries are surely not impertinent, especially in view of the sworn statement of the husband in his answer "that she is not carrying on any business and does not contemplate engaging in any business and has no separate earnings and can have none." The Act does provide that the married woman's earnings shall accrue to and inure to her separate benefit and use and be under her control independently of her husband, and so as not to be subject to any legal claim of her husband, or his creditors, the same as if she were a *feme sole*. But it is too much to ask this woman from the lofty pedestal that the legislature has constructed for her, to condescend to favor us with a little information as to her earnings or salary, property or business? When the last petition of this kind was presented to us, we took the liberty to inquire for the sake of definiteness, in what part of the county the petitioner resided, when the reply was that it was not deemed at all important, that the counsel himself was not sure where the petitioner lived, that she was the wife of a tenant and belonged to a roving class. In some such cases it may be that we "license a class of female pirates, who engage in business without responsibility and make reprisals upon the grocer, the baker, the butcher, the mechanic and other persons with whom the woman may deal in the transactions of her business." 40 Leg. Int. 151, Bovard v. Keltering.

Certainly the Acts of 1848 and 1872, have emancipated married woman to some extent from the shackles of the common law. For certain purposes a married woman now stands upon the same plane as a *feme sole*. To this extent the legislation referred to has destroyed that unity of person which existed at the common law. In plain words she has to a certain extent been "emancipated" by this legislation from the conjugal vow, from that unity which "is in exact accordance with the revealed will of God, was designed for the protection of the woman and leads to that identification of sympathies and interests which secures to families and neighborhoods the blessings of harmony and good order." Ritter v. Ritter 76, 396.

We do not intend to underrate the wisdom and utility of the Act of 1872. In cases of wives of drunken or improvident. unfaithful or inofficious, disabled and helpless husbands, the statute affords the wife valuable and merciful protection. But the husband and the public have a right to know in such a case as that of Mrs. Slaybaugh, something about her property or business, to have some brief statement of it in her petition, that it may give some glimmering at least of the character of the separate earnings which she designs to secure. Neither she nor any other like petitioner shall be compelled in this proceeding under this Act of 1872, to show title and ownership in the property specified, in order to entitle her to the benefits of the Act, but we must require her to set out her *claim* of title and ownership, and to state her present or in-

tended labor or business, so that the records shall communicate some little public information pertinent to the proceeding. The petitioner in this case may have entirely misapprehended the scope and purpose of the Act of 1872 and its applicability to her situation. She very probably has, if the statements contained in the husband's answer are true.

It is therefore, October 16, 1883, ordered that the petition be amended or a new petition filed in conformity with the views expressed in the foregoing opinion.

C. P. of Lancaster County

Kraft v. Landis.

Domestic Attachment—Contract of Minor —When infancy a bar to action.

When a minor contracts for goods, the same not being necessaries, and afterwards a domestic attachment is issued for the goods, and the minor, through his guardian, ad litem, pleads his infancy: HELD, that the attachment, for that reason, must be dissolved.

When the attachment against the defendant cannot be sustained the proceedings against the garnishee must end

Domestic attachment; issued July 7, 1883

August 19, 1883, affidavit presented and rule granted to show cause why the attachment should not be dissolved, &c.

October 1, 1883. LIVINGSTON, P. J.—John A. Kraft, by affidavit filed, sets forth that George G. Landis, the defendant, is justly indebted to him in the sum of $180 for divers cigars, goods, wares and merchandize, sold and delivered by him to said Landis, and at his request, on May 30, 1883; that said sum is due and payable; that defendant lives at the house of his father, Jacob R. Landis, in Warwick township, Lancaster county, Pa.

That on or about July 3, 1883, he absconded or departed from his usual place of abode with intent to defraud his creditors, as said Kraft believes; that he has left in this county a clear freehold estate sufficient to pay his debts; and that he has left at least eight cases of cigars with the aforesaid Jacob R. Landis, who shall be summoned as garnishee, etc.

Upon this affidavit a writ of domestic attachment was issued and delivered to the sheriff of Lancaster county.

To this writ the sheriff returns, that by virtue thereof, he has attached "six cases of segars," which have been appraised as of value of $540, goods alleged to belong to the defendant, in the hands and possession of Jacob R. Landis and summoned him as garnishee by reading and copy, July 7, 1883.

On August 17, 1883, defendant filed an affidavit, denying all the material allegations in plaintiff's affidavit, and alleging that he is a minor, and under the age of twenty-one years, asking that the attachment may be dissolved.

He also presented a petition asking the appointment of a guardian *ad litem* to appear for him in said suit; whereupon the Court appointed John F. Ruth, as guardian *ad litem*, and John F. Ruth, as such guardian, has presented his petition and asks that the domestic attachment may be dissolved for the reason that the defendant, George G. Landis, is a minor, and the attachment cannot be maintained against him.

A number of other parties have under and by virtue of the Act of assembly, in such case provided, had their names suggested on the record, as parties plaintiff, and are now plaintiffs in the action. It is admitted by the plaintiffs that George C. Landis, the defendant, is a minor, and under the age of twenty-one years.

It is admitted on the part of defendant that the goods levied on by the sheriff, by virtue of the writ, are not claimed as the property of George G. Landis, but are claimed by Jacob R. Landis, who has been summoned as garnishee, to be his own property.

In answer to the rule plaintiff's counsel has filed several reasons why the attachment should not be dissolved, to wit:

1. Because the defendant appears only by attorney and pleads his infancy.

2. Because the defendant don't claim any interest in the property as against his father, the garnishee.

3. Because the father and garnishee is made a party to these proceedings by the 4th Section of the Act of Assembly of the Commonwealth of Pennsylvania, of June 13, 1836, and has made himself a party in interest by claiming the property as his own by reason of some arrangement with the son. The equitable power of the Court is ample under the 37th Section of the Act above cited, to order this case to proceed to test this father's right to this property against these plaintiffs, from whom his son obtained it, and against whom said son pleads his minority to protect the father's title to the same.

4. Because this garnishee has failed to appear in Court on the day mentioned in this writ, as he was bound to do in obedience to the summons of this Court, and the 4th Section of the Act of 1836, hereinbefore cited.

5. Because the defendant is not now denying the allegations upon which this writ was issued as the reason for dissolving it.

The matters complained of by plaintiff, originated in a contract between him and George G. Landis, and the same is true with reference to those who have asked to become parties plaintiff here. George G. Landis, the defendant, contracted with them, purchased from them quantities of tobacco, cases of tobacco, amounting in all to about $695, which were by them delivered to him, and for which he refuses to pay them.

There is no allegation or pretence that any of the goods furnished came within what the law designates, and regards as necessaries for a minor, and for which he may properly contract and be bound to pay *nolens volens*.

These appear to be contracts of that class which the law declares an infant incompetent to make, and, if he make them may avoid them by reason of his minority. They are cases in which, if actions of assumpsit were brought against him, his plea of infancy would be a complete bar to a recovery if the fact of infancy were established. In these cases it is admitted. It is not alleged that in any case he fraudulently represented himself of full age, and thus induced the parties or any of them to contract with him, or if he had done so the fact would not, at law, constitute a good replication to a plea of infancy, nor be sufficient as the basis of a replication on equitable grounds, though it would, perhaps, entitle the plaintiff to relief, if made the subject of a bill in equity.

The law considers an infant as devoid of sufficient discretion to carry on a trade, and therefore, not liable on a purchase of goods supplied to him for his trade or business. Therefore, the contracts of an infant at common law cannot be enforced, except for necessaries. He has no power to bind himself to pay money borrowed by him to make repairs on his estate (1 Grant 53) and whenever the substantive ground of an action against an infant is contract, (except for necessaries) the plaintiff cannot recover. (6 Watts 9.) In an action in a judgment confessed before a justice, the defendant may interpose the defence of infancy at the time such judgment was obtained (7 W. & S. 170), and a judgment entered on a warrant of attorney given by an infant, will be opened by the Courts to let in the defence of infancy, (1 Luz. Leg. Reg. 332), and where entered on a joint "judgment note," executed by a minor and an adult, the judgment will be stricken off as to the minor.

This being the case and the first reason assigned having been removed by the appearance in the case of the guardian *ad litem*, there appears to be no valid reason why the plea of infancy should not be as valid and effectual in this mode of proceeding, as in an ordinary action of assumpsit brought against the infant to recover the price and value of the goods sold and delivered to him; wherein as we have seen, it would be a good defence and prevent recovery—and although this is said to be, and doubtless is a hard case, the hardship of special cases must not be permitted to run away with the law. It would be an exceedingly dangerous expedient to fritter away a principal in order to sustain an exceptional case. As the case has been presented we feel bound to make the rule absolute and dissolve the attachment.

Having arrived at the conclusion that the attachment cannot be sustained against this minor, the proceedings as against the garnishee, must also fall, there being no defendant, there can be no garnishee. The garnishee is only made a party by reason of his being a custodian or supposed custodian of property belonging or alleged to belong to the defendant in an attachment, when there is a legal defendant. He is not a voluntary party to the proceedings in any case; he is summoned at the instance and upon the suggestion of the party who issues the writ. The garnishee does not come in and ask that this attachment be dissolved as against the defendant or the garnishee. He does not attempt to make himself a party, or in any manner interfere with the proceedings, as the parties did in Lawrence's Appeal, and kindred cases cited. The reasons filed which refer wholly to the garnishee cannot be sustained. The attachment is therefore dissolved, this being done, it only remains for the Court to dispose of the question of costs, and as the whole proceedings, as they have been presented, show a course of conduct on the part of the defendant, wholly unjustifiable, and highly reprehensible, we have no hesitation in saying that he should pay the costs of this attachment proceeding; and we do now order and direct, that the defendant do pay the costs of said proceeding when properly taxed.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, OCTOBER 25, 1883. No. 34

SUPREME COURT.

Susan Leidig v. The New Era Life Association of 1876, of Philadelphia, Pa.

In the certificate of life insurance in suit, the company covenanted and agreed in consideration of certain payments and assessments, "at the expiration of sixty days after proof of the death of Jacob W. Leidig, to pay or cause to be paid unto Susan Leidig his wife, or their heirs and legal representatives, the sum of three ($3.00) dollars for every $1,000 maxium sum of benefit actually in force in this association upon the decease of the said Jacob W. Leidig, and upon which the mortuary assessments are paid; provided the amount so paid shall not exceed the maxium sum of three thousand dollars." HELD, by the Court below, and affirmed by the Supreme Court that the burden of proof was not upon the plaintiff, but upon the defendant, to show, that there were "$1,000 maximum sums of benefits actually in force in the defendant company upon the decease of the insured, and upon which mortuary assessments are paid."

It was for the jury to determine whether the applicant had "read or heard read all the answers in the application."

Error to the Court of Common Pleas of York County, No. 51, June T., 1880.

The main facts in this case are developed by Judge Gibson in the following charge to the jury:

This is an action of covenant brought by Susan Leidig against The New Era Life Association, of Philadelphia, to recover the amount payable on the death of her husband, Jacob W. Leidig. A certificate of membership in the said association, issued under seal of the corporation to Jacob W. Leidig, on the third day of June, 1879. This certificate recites the payment of thirty dollars, and a covenant to pay annually the sum of nine dollars each year, and the mortuary assessments required. In consideration whereof the New Era Life Association covenants to pay, at the expiration of sixty days after reasonable and satisfactory proof of the death of Jacob W. Leidig, to pay to Susan Leidig, his wife, three dollars for every thousand dollars maximum sum of benefit actually in force upon the decease of the said Jacob W. Leidig, and upon which the mortuary assessments are paid; provided, the assessment so paid shall not exceed the maximum sum of three thousand dollars. Then follow the conditions which shall release the association from liability; as, that: Any misstatement or concealment of any fact touching the health, occupation, or material to the question of longevity of the applicant, the certificate thereupon shall become void.

The only assessment called for during the life of Jacob W. Leidig was paid, as is shown by receipt dated December 18, 1879, for $7.74. Mr. Leidig died on the 7th of February, 1880. The preliminary proof of notice to the association of this fact, and also the sufficiency of it, was for the Court, as to whether it was reasonable and satisfactory according to the terms of the certificate. The papers in relation to this matter are in evidence, and furnished to the insured. On the state of these facts, and on a failure to pay, at the expiration of sixty days, the plaintiff asks to recover the assessment payable.

These are certain general facts in proof that should be stated before we come to the consideration of those facts more especially in issue under the pleadings in this case.

At and about the time this insurance was effected, a large number of applications were made to other companies, and policies or certificates of membership issued, some before and some after this one, on the life of Jacob W. Leidig, in some of which the plaintiff and beneficiary, and in some their son, and in one a daughter. The names of the several companies, eighteen, I believe in number, have been detailed before you; and the statements in the several applications, medical certificates and death proofs, have been read to you and commented upon. The amount of insurance effected being $52,000.

As already stated, Mr. Leidig died on the 7th of February, 1880—within the year after those assessments were effected. In the month of March, 1880, the body of Jacob W. Leidig was exhumed and an autopsy was held. That is, the body was taken from the grave and par-

tially dissected, for the purpose of ascertaining the cause, nature and locality of the disease of which he died. There were a number of the physicians of York present at the examination of the remains. One of the physicians made the dissection. The heart, the lungs, the stomach and viscera, the liver, the brain were taken out and portions put in jars and sealed up—some portions in a bucket were taken to the almshouse for further examination. The jars were taken to Philadelphia, and then given to two analytical chemists. These chemists analyzed portions of the stomach, kidney, liver, spleen, and the intestines, and found mercury in all those parts; which in the metallic form has been produced before you. At the post mortem, in York, the lungs were found, so far as examined, in a healthy condition; the liver was found to be diseased and enlarged, and in the condition described to you by the medical experts. There was some difference of opinion among the physicians as to the condition of the heart, but some of them have testified that the left ventricle was dilated and the walls unnaturally thin.

Immediately after the death the undertaker had injected the body of Jacob W. Leidig, through the mouth and nostrils, with an embalming fluid, known as the American Segester Fluid. Another bottle, labelled the "American Segester Fluid," obtained since, was given for analysis, pending this trial, to a chemist, who found among its ingredients mercury.

The defendant resists the payment of the claim on several grounds. The certificate of membership was taken subject to covenants contained in the application for membership, covenanting that the answers were true, that any mis-statement or concealment of any facts touching the health of the applicant, or material to the questions of longevity, or rendering the risk more hazardous, should cause the certificate of membership to become null and void, and thereupon the said association should be absolutely released from any liability.

The first, in answer to the questions whether he had ever been addicted to the use of opium, alcoholic or other stimulants, the applicant, said, never except smoke cigars; and are your habits regular and temperate now, said always, which defendants says are mis-statements and untrue.

2nd.—That in answer to the question whether he had ever been rejected in an application for life insurance, the applicant said no, which defendant says was a mis-statement and untrue.

3rd.—That in answer to the question are you now insured—the amount, and in what companies, the applicant said yes, $4,000—U.B.$3,000, Home $1,000, which defendant says was a mis-statement and untrue.

The defendant called several witnesses, to prove that the insured was addicted to drink, from Cumberland county, where he formerly resided, and in York, some of whom testified to having seen him drink frequently, and others to an appearance of lethargy, from which the use of intoxicating drink might be inferred, and also that at post mortem examination his liver was affected in a way to indicate excessive use of the same. The plaintiff also called several witnesses to prove from their knowledge and observation of the insured, that they had never seen him take a drink and never saw him under the influence of liquor, and from that which it might be inferred that his lethargy at times was caused by his being called up at night, and that his death was caused by hemorrhages and not excessive drink. This is a fact for you to determine, and it has been commented upon by counsel, and if you find that there is evidence that he was addicted to the use of alcoholic stimulants, and that he was not regular and temperate, within the meaning of the question in the application, that he made

mis-statements and untrue answers, then the certificate of membership would be null and void, and the company would be released from liability. If on the other hand you find that he was not addicted to drink, and was regular and temperate in his habits, without the meaning of the question in the application, then this will not interfere with the plaintiff's claim, if otherwise entitled to recover. Addicted to the use of alcoholic drinks means devotto to drink by customary practice, habitually practicing drinking, giving up to intemperance, and within the meaning of the certificate, so as to be material to the health and longevity of the insured.

Whether or not the insured made false representations in his answers as to the amount of insurance on his life is also a question of fact for you to determine. This application was made on the 31st of May, 1879, and at that time application had been made to several insurance companies. The testimony on behalf of the plaintiff shows that the agent of the company, with another man, called upon Mr. Leidig and solicited this insurance. And it was testified that the agent asked him how much insurance has Mrs. Leidig on your life? To which he replied $4,000; $3,000 in the U. B. and $1,000 in the Home, as stated in the answer. That the certificate of other companies had not reached Mr. Leidig, as yet. It was further testified that the full application was not read to him, only that part as to his habits and health. The defendant shows applications to the amount of $17,000, and upwards, at the time of the application in this case, and that there was insurance for $6,000 in the U. B. Mutual on his life. If you find the answer as to the amount of the insurance was untrue, and that he was not deceived by the representatives of the agents who called upon him to solicit and effect this insurance, or blinded or mislead by them in any way, or the applications filled up in their own manner one of whom knew and secured their prior applications to other insurance companies, then the certificate of membership would be void and the company released from liability. If the contrary, then the plaintiff's claim is not avoided, if otherwise entitled to recover.

Another ground of the defence is, that an untrue answer was made in the application, namely, whether he had ever been rejected in an application for life insurance, to which the applicant said no. And it is averred that he had been rejected by the York County Mutual Aid Association at the time. The proof is that the application was made to the York County Mutual on the 13th of May, 1879. That it was received and approved May 23, 1879. But the clerk could not tell when the application was not approved. That a policy issued May 31, 1879, which was retained in the office. It appears it was subsequently refused. Whether or not, from there circumstances it was refused before this application is a question of fact. The plaintiff also produced testimony by the agent who solicited the insurance, who said that, having applied for a larger insurance, he refused to take one for $1,000. Whether or not this was a refusal, or whether or not, if a refusal it was before this application, is for you to determine. And if you find it was a prior refusal, and the statement in answer was untrue, the policy would be void, but if not a refusal, the plaintiff can recover, if otherwise entitled to recover.

Another ground of defence is, that in answer to the question in the application —how long since you consulted and employed a physician—name and residence —for what? the applicant said, Never; have taken medicine for colds, but never had any serious illness. The testimony with regard to the truth or falsity of this statement is very slight. An application to the State Mutual of Ohio contains a statement of an attack of rheumatism. But the agent who took that insurance said that Mr. Leidig never saw that ap-

plication. And Mrs. Leidig said she didn't know when he was attended by a physician, that he had a sunstroke in June, 1879, but did not know whether the doctor was called or stepped in, and that he was not attended by any physician prior to the attendance of Doctor De Burkharte, which was on November 6, 1879. The insured said to Mr. Stock that he had a sunstroke in the summer of 1879, between the latter part of May and the latter part of June, 1879. But it is a question of fact for you to determine whether there was, or was not, an untrue answer to this question, and if not true, the policy is void, and the plaintiff cannot recover; if not untrue, the plaintiff can recover, if otherwise entitled to recover.

The last ground of defence is, that the plaintiff, Mrs. Leidig, and her husband, Jacob W. Leidig, and their son, Albert J. Leidig, and others, entered into a conspiracy to cheat and defraud the defendant and other insurance companies, by means of false answers as already stated, and effected a membership in the New Era Life Association, the defendant, for their mutual benefit and advantage, and to divide the amount of insurance. That they caused the insured to make false answers, and conspired together to encourage him in habits of intemperance, for the purpose of shortening his life, and causing his death before the expiration of his expectancy, and that intemperate habits was the cause of his death. That the conspiracy went further, and that his death was caused by administering poison to him in his last illness.

A conspiracy is an agreement between two or more persons to cheat and defraud another. There is no charge against the plaintiff in this case outside of the alleged conspiracy. It is not charged that the plaintiff alone procured the insurances, or this one, or impaired her husband's longevity, or administered poison with her own hands. But there was a concert of action, by her with her son and husband, and with others for the purpose. In support of such conspiracy, they show the very large amount of insurance taken, and produce testimony to show that Mr. Leidig was embarrassed and poor, and to show ill treatment of Mr. Leidig by his family, by two or three servants, with a declaration of A. J. Leidig, the son, in the presence of his mother, that if Mr. Leidig could not recover, he would find a way to put him out; an altercation, a struggle at the hotel between Albert and his father. That on one occasion Mr. Leidig's voice was heard in a high tone, followed by the falling of a body; and that the post mortem examination indicated diseases of the liver from intemperance, and that the presence of mercury in the portions of the remains analyzed in Philadelphia, indicate that corrosive sublimate, or a preparation of mercury in some irritant form had been administered just previous to his decease. And other circumstances in the case, commented upon by counsel, and which you will remember.

The plaintiff on her part has produced testimony to show that she and her husband had money, made and inherited, and to show kind and attentive treatment on the part of the family toward Mr. Leidig, and careful attention to his wants during his last illness. That he had frequent visitors, that gentlemen set up with him at night, the plaintiff being much in the room, and watchful of his wants and diet, and plaintiff denies the words spoken by A. J. Leidig. That Mr. Leidig had hemorrhages (which plaintiff says was brought on by excessive lifting,) which commenced in November, 1879, and continued at intervals to the time of his death. That the attending physician and other physicians pronounce the cause of his death to be hemorrhages, and that the indications of the post mortem showed a condition of the vital organs which could have produced congestion of the lungs resulting in hemorrhage, and that the corrosive sublimate or presence of mercury in the system, is

YORK LEGAL RECORD.

VOL. IV. THURSDAY, NOVEMBER 1, 1883. No. 35

accounted for by the injection of an embalming fluid, through the mouth and nostrils of the corpse, by the undertaker for the purpose of preserving the body, and that the embalming fluid contained corrosive sublimate.

It is necessary in order to prove a conspiracy to show some concert of action between the persons charged with the conspiracy. In order, therefore, to find the plaintiff to be a conspirator, you must find from the facts and circumstances of the case, that she agreed in some way with the other persons named to defraud this company, and that she agreed with the others to obtain all of these insurances fraudulently. The conspiracy alleged has a double aspect. First, that Mrs. Leidig, plaintiff, and her son and her husband conspired together to obtain all of these insurances, not for the *bona fide* intention of insuring her husband's life, or making an investment of any money she had, but that they expected to realize the large amount of money insured by false statements in the several applications. The testimony of the insurance agents show how they themselves secured these several risks. Mr. Motter, for instance, several, and Mr. Stock several, and Mr. Eneas Smith this one. You have had detailed to you conversations between them and Mr. and Mrs. Leidig. How persuasions were used and arguments *pro* and *con* as to the feasibility of effecting the insurances. A life insurance policy does not strike the ordinary mind as a means of investment, depending upon the expectancy of the life of the insured. When a man takes out a policy of insurance on his life or that of another, it is because of the uncertainty of life. It is because the person insured may die within the expectancy, in five years, in two years, in one year, in one month, the next day. The advantage to persons not wealthy is, that when the husband or father dies, by any sickness or casualty unforseen, his family may not be left destitute. These assessment companies do not differ in this repect from the old line companies. Such companies form a membership on the basis that if one dies all the others must contribute a certain proportion or fixed sum, and as there is no liquidated capital from which to pay losses, they depend upon the payment of assessments to meet the claims against them. This consideration may serve to explain how, in one point of view, that is, in case of a party living out his expectancy, a calculation of the money he has to pay may be prudent, but the main object of insurance is the realizing the amount of the policy in case of death before that period, and in that way it may be a good investment.

The second aspect of the conspiracy charged is, that the parties concerned originally included Mr. Leidig himself as one of them. But when we come to that part of the conspiracy which contemplates the impairing of the longevity, the hastening of the death of the insured, by an encouragement of intemperate habits, and finally, by the ending of the life of the insured by foul means, then Mr. Leidig cannot be presumed to be a participant in the means to hasten his own death. The concert of action, the agreement must be proved to exist between the plaintiff and her son, conceived and concerted after the insurances were effected, unless a deep plot of that character existed from the beginning to make Mr. Leidig a victim.

The credibility of the witnesses on either side is for you to determine, and you will take the whole of this evidence, and find whether or not such a conspiracy is proved by the defendant, with the fatal results charged by them, or whether the insurances were originally *bona fide* taken, and Mr. Leidig died by one of these extraordinary ills that flesh is heir to, whether from physical predisposition, superinduced by

by over exertion or otherwise, and known as congestion and hemorrhage.

If you should find that there was such a conspiracy, the plaintiff cannot recover. But if you find that there was no such conspiracy, and that the insured did not make untrue answers in his application, if untrue, that he was misled by the agents who solicited or secured the insurances, the plaintiff can recover in this action the amount of the maximum sum named in the certificate of membership, namely, the sum of three thousand dollars, with the interest from the time of payment.

I have endeavored to assist you in your deliberations, as far as I could, by grouping together the testimony pertinent to the issues you are to determine as to the facts in this case, but I can express no opinion as to the facts.

On the 3d of February, 1882, the jury rendered a verdict in favor of the plaintiff for $3333.00 with costs. On a writ of error, the defendant filed forty-three assignments of error. The 34th to 37th assignments of error involving the construction of the policy were as follows:

34. In refusing to affirm defendant's third point:

(3.) To entitle the plaintiff to recover in this action it was necessary for her to show (1) that the defendants were satisfied with the proofs of death forwarded and that she had a *bona fide* claim; (2) the number of $1,000 maximum sum of benefit actually in force in this association (the defendant Co.) upon the decease of the said Jacob W. Leidig; and (3) that assessments had been paid to said association, (defendant Co.) and the amount thereof on account of said claim—as the proof failed on all these points, the plaintiff cannot recover and your verdict must be for the defendants.

(We cannot affirm this point.)

35. In refusing to affirm defendant's 4th point and instructing the jury that the clause referred to was an exception in favor of defendant.

(4.) The plaintiff can only recover the sum of three dollars for every $1,000 maximum sum of benefit actually in force in this association upon the decease of said Jacob W. Leidig, and upon which assessments were paid, and as there is no evidence in the case of the number of such $1,000 benefits or insurance in force, nor that any assessments were paid, your verdict must be for the defendants.

(We cannot affirm this point. The clause in the certificate of membership referred to is an exception in favor of defendant, which has not been shown in this case.)

36. In refusing to affirm the defendant's fifth point:

(5) There being no proof that there were any "$1000 maximum sums of benefits actually in force in said (this association) defendant company upon the decease of the said Jacob W. Leidig, and upon which mortuary assessments were paid," the plaintiff is not entitled to damages or to a verdict, and you must therefore find for the defendants.

(We cannot affirm this point for reasons given in last point.)

[Having affirmed defendant's sixth point:

(6.) The defendants have pleaded and given in evidence the application for membership made by Jacob W. Leidig, upon which the certificate of membership declared upon was issued; among other things contained therein are the following questions and answers: "24. Does the applicant understand that he is responsible for all answers in this application, including medical examination?" Answer: "Yes." "Did he read or hear read all the questions and answers before signing?" Answer: "Yes."

There is also contained in said application the following: "It is hereby covenanted and agreed that the above answers are true; that a misstatement or concealment of any fact touching the habits of the applicant or material to the question

of longevity, or rendering the risk more hazardous * * * that then, and in every other event the certificate of membership shall become null and void, and the association [defendant company] shall be absolutely released from any and every liability resulting from said certificate of membership, contract and application." The effect of which is, that if the said Jacob W. Leidig made or gave any untrue answers the certificate of membership is null and void, and your verdict must be for the defendants.

[This point is correct.]

37. In refusing to affirm defendant's seventh point, and in instructing the jury that it was for them to determine whether the applicant had "read or heard read all the answers in the application:"

(7.) The evidence introduced for that purpose by the plaintiff failed to show that the applicant did not read or hear read all the questions and answers contained in the application; therefore he and the plaintiff are bound by the answers therein made and contained.

(The question raised on this point as to whether the plaintiff did or did not read or hear read all the questions and answers contained in the application is for the jury to determine, and therefore we cannot affirm this point.

Cochran & Hay, and *W. Henry Smith* for Plaintiff in Error cited no authorities on the above assignment of error.

E. W. Spangler, *W. C. Chapman* and *Hon. F. Carroll Brewster* for Defendant in Error.

When a fact is peculiarly *within the knowledge of a party*, the burden is on him to prove such fact, whether the proposition be negative or affirmative; Wharton on Evidence, 367, 368; 13 La. Rep. 397; 30 Ill. 347; 6 T. R. 57; 6 Gray 192; 17 P. F. Smith 370.

The law will not force a man to show a thing which by intendment of law lies not within his knowldge: Best on Evidence 274, 504 and 506; 16 A. & E. 125; 3 B. & B. 302.

Per Curiam—We have examined the voluminous evidence and considered the forty-three specifications of error assigned; but we find no error sufficient to require a reversal of this judgment. We will not refer to them seriatum. In view of the nature and character of the defence set up and the numerous questions raised, the case was well tried. No just complaint can be made to the rulings relating to the evidence, nor as a whole to the manner in which the case was submitted to the jury. Substantial justice appears to have been reached by the verdict. Judgment affirmed.

COMMON PLEAS.

C. P. of Franklin County

Lake's Estate.

A devise to two sons of all testator's real estate, after the decease of the widow, "by paying" the pecuniary legacies, has the effect of charging these legacies upon the real estate devised.

Such a lien is not discharged by a sheriff's sale.

Exceptions to the report of John C. Sife, Auditor distributing proceeds of Sheriff's sale of the real estate of James L. Lake.

The facts appear in the Court's opinion.

Geo. A. Smith for exceptions.

J. Nelson Sifes and *John A. Robinson* for report.

October 22, 1883. McCLEAN, P. J. It is shown by the auditor's notes that Hon. Geo. A. Smith appeared at the audit for Messrs. Lodge and Nelson, the purchaser's at the Sheriff's sale and also for the legatees. The auditors find as a fact "that when Jacob J. Mellott purchased the 'Brick House property,' it was agreed that he should pay the legacies."

I am somewhat at a disadvantage in not having an oral argument upon the exceptions, but I must understand of course that the agreement referred to was between Joseph B. Mellott and Jacob J. Mellott and that the legatees whose legacies have not been paid were not parties to such agreement.

I am of the opinion that the auditor's conclusions of law are correct, both that the testator intended the legacies to be a charge of the land devised; and that the testamentary lien was not discharged by the sheriff's sale.

The testator gives to his widow after all his legal debts are paid, all his real and personal estate during her widowhood. He devises to his two sons Joseph B. and Elias Mellott, after his widow's decease, all his real estate *by paying* the pecuniary legacies at his widow's decease. The two sons were to have the land by paying these pecuniary legacies, the words "by paying" being the very same that are found in the case of Drake v. Brown, 18 P. F. Smith 223, and in which the legacies were held to be evidently intended by the testator to be charged upon the land devised. While to make legacies a charge on land it must be found that such was the testator's intention, still it is not necessary that its ascertainment should rest on direct expression, it is enough if the intention appears by natural and obvious implication from the provisions of the will: Gilbert's Appeal, 4 Norris 347. The legacies unpaid must be maintained as a fixed lien on the land. The purchasers had constructive notice of the charge and they were bound to know that it was a lien of such indeterminate value that it would not be divested by the sheriff's sale. They will have to pay it therefore, when it becomes due. Dewart's Appeal, 7 Wr. 325. Its value is incapable of being definitely ascertained, and it was created to run with the land. Cowden's Estate, 1 Penn. St. 267; Heist v. Baker, 40 Ibid 9; Heister v. Green, 48 Ibid 102; Helfrich v. Weaver, 61 Ibid 390.

The devisees Joseph B. and Elias having accepted the devise, they may have become subject to a personal liability to pay the legacies, which may be enforced against them in an action of debt instituted by the legatees or by the purchasers when subrogated to the rights of the legatees by payment of the legacies: Etter & Snyder v. Greenawalt, 2 Outerbridge 422. How far such liability may be varied by the undertaking of Jacob J. Mellott to pay the legacies out of the "Brick House property" sold to him by Joseph B. Mellott is also a question not before the court and does not appear to have been raised before the auditor. Whether Jacob J. Mellott's grantee Jacob W. Mellott received a conveyance of general warranty I cannot now see, not having the record at hand.

And now, to wit: October 22, 1883, it is ordered and decreed that the exceptions be dismissed and the auditor's report confirmed without prejudice however to any rights which the purchasers may have to resort to the devisees upon the personal liability of the latter, or to any remedy which the purchaser may be entitled to upon any undertaking of Jacob J. Mellott or his grantee Jacob W. Mellott.

Landlord and Tenant—Covenant to pay Gas—Distress—The lessee covenanted to pay rent $1500 per annum, and also "the gas bills at the rate of three dollars per 1,000 feet during her occupancy of the premises." *Held*, that the landlord could include the amount due for the gas in his distraint.—*Fernwood Masonic Hall Association et al. v. Jones and Wife.*—14 Pittsburgh Legal Journal 86.

Lunacy—Opening Judgment.—An inquisition finding a person a lunatic is *prima facie* evidence of incompetency to make a contract at any time covered by the finding, and in the absence of evidence to over come the presumption, or to show that it would be unconscionable to do so, a judgment confessed by him during the period will be opened.—*Gresh v. Tamany*, 12 Luzurne Legal Register 291.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, NOVEMBER 8, 1883. No. 36

SUPREME COURT.

Gilbert v. Moose's Administrators.

Life Insurance—Wager Policy.

A policy of life insurance was issued to J., a son of the assured's daughter-in-law. J. assigned it to G., who paid the assessments, &c., and upon the death of the assured received the amount of the policy. Suit was brought by the administrators of the assured to recover the amount received by G., less assessments and dues paid by him. HELD, That plaintiff's were entitled to recover.

A gambling policy will not be enforced in this state.

The proceeds of the policy could not go to J. or his assignee, since he had no insurable interest.

The dictum of Sharswood in Insurance Co. v. Sleau, 2 Casey 189, does not apply to this case, for that is only applicable to a case where the policy is bona fide, and founded on an insurable interest.

Error to the Court of Common Pleas of Adams County.

The facts of the case are found in the Court's opinion.

May 31st, 1883. GORDON, J. Jacob Moose in his life time, August 17, 1880, made application to the Southern Pennsylvania Relief Association of Hanover, York county, Pa., for an insurance on his life, and upon this application a Policy or Certificate of Membership, as it is called, in the sum of two thousand dollars, was issued for the benefit of one Peter Jacobs, an alleged grand-son of the assured. It turns out, however, that Jacobs was in no way related to Moose, being but a son of a son's wife, hence having no assurable interest in the life on which the policy was issued. On the 31st of August following the date of the certificate, Jacobs for the consideration of twenty-eight dollars, assigned to John G. Gilbert, the defendant, by whom all subsequent assessments made by the company were paid. On the 3rd of April, 1881, Jacob Moose died, and the defendant received from the company on the policy some three hunderd and fifty-six dollars. It was for this sum of money, or the balance of it, after deducting the assessments and other expense paid by Gilbert, that this suit was brought. The court below after hearing the evidence, directed the jury to return a verdict for the plaintiffs, and reserved the following point "whether or not, the assignment being made upon the consideration of the payment of twenty-eight dollars, the assignee having no interest in the life of the assured, and having taken the assignment for the purpose of speculation only, is entitled to retain the money received on the policy as against the personal representatives of the deceased beyond the amount of the consideration, fees and assessments paid to the association." Afterwards on agreement the Court entered judgment on the verdict for the plaintiffs. We are thus at once brought face to face with the question, really the only one in the case, can one having no interest in the life assured, and for the purpose of speculation only, acquire by assignment or otherwise, such title to the policy as the law will enforce?

It was held by this Court as early as 1803, in the case of Pritchet v. The Insurance Co., 3 Yeates 458, that every species of gaming contracts of insurance, wherein the insured has no interest in the subject matter of the policy, or one only colorable, is in this Commonwealth, without sanction of either law or usage; that such contracts are mischievous and dangerous to the interests of trade, commerce and society, and are to be reprobated rather than encouraged by our Courts. The very same view of this subject is adopted in Edgwell v. M'Laughlin, 6 Wharton 176, and it was there said that no kind of wager had ever been recoverable in the Courts of Pennsylvania.

So also in the case of Adams v. The Insurance Co., 1 Rawle 97, it was asserted that, in this State a gaming policy cannot be enforced. We need not stop to consider at length the principles on which these decisions rests for they must be obvious to every sound moralist.

The gambler is as a rule reckless and dangerous, and seldom hesitates at the means necessary to secure his bet. We have within our own knowledge a case

in which a wagering policy on a life resulted in murder.

So far, however, as the policy itself is in this case concerned, we must take it as valid, nothing to the contrary appears from the evidence, and its validity seems not to have been questioned in the Court below.

The sole inquiry then is, to whom do the proceeds belong? Was the Court right in holding that they could not go to Jacobs the beneficiary named in the certificate, or to the defendant his assignee, because of their want of interest in the assured life? If so judgment was properly entered for the plaintiffs, for in that case the beneficial interest in the risk remained in Jacob Moose and the representatives of his estate.

We do not overlook the fact that the status of Jacobs is the point of this case, for if he was the proper and lawful beneficiary then, even were Gilbert without right, the plaintiffs could not recover, for the proceeds of the policy would belong to Jacobs, and on the other hand, if his claim was not good he had nothing to assign to the defendant. But as a beneficiary merely having no interest in the life, it seems to us very clear that he could lawfully have no interest in the policy. For if we admit the contrary; if we admit that one man may insure his life for the benefit of another, who is neither a relation nor a creditor, our whole doctrine concerning wagering policies goes by the board. The very foundation of that doctrine is, that no one shall have a beneficial interest of any kind in a life policy, who is not presumed to be interested in the preservation of the life of the insured. But in the case supposed the presumption is inverted, the beneficiary is directly interested in the death of the assured.

However if such a transaction were permitted the wager could always be concealed under the mere form of the policy. Nor can we see that did the defendant's case depend on an assignment directly from Moose to himself how it could be bettered in the least.

The reserved point alleges that Gilbert took the assignment for the purpose of speculation and of this there can be no doubt, for, for what other purpose could it have been taken?

But speculation in what?

The life of Moose and the sooner that was determined the better the speculation.

If there is any difference between this and an original wager policy, I confess I cannot see it. Under the case put, Gilbert as an assignee undertakes to pay the assessments; he pays one, say for example of ten dollars, and the sole and only consideration for that payment is the chance that the life may fall in before the next assessment, and that for his ten dollars he may get one hundred or, perchance, one thousand dollars.

Between this and the bet in the case of Phillips v. Ives, 1 Rawle 458, on the life of Napoleon Bonaparte we can see no material difference. Both are wagers, and both dependent on the contingency of a life.

No semblance of authority from either Pennsylvania or Federal Courts has been adduced in support of the position assumed for the plaintiff in error, except a dictum of Judge Sharswood, then President of the District Court of Philadelphia, in the case of the Insurance Co. v. Robert Sleau, 2 Ca. 189. Not only is the case itself very far from being in point, but even the language cited was intended to have no application to a case like that in controversy.

The position assumed by the learned judge is that where a policy is bona fide and founded upon an insurable interest, the assignment or gift of it, to a friend or other person, is no fraud upon the insurance company by which it was issued. This, however, is a position not controverted in the suit now under consideration. Therefore admitting this dictum to be authority in a case proper for its ap-

plication, it is certainly not so in the case on hand.

When we pass from our own Courts to those of neighboring States we find such difference in the decisions upon this subject that as authority, they afford us little or no help in the way of a definite conclusion. In Rhode Island, Clark v. Allen, 11 R. I. 439, it has been held, that the assignment of a life policy to one having no interest in the life insured is good.

On the other hand in New York in the case of Ruse v. The Life Insurance Co., 23 N. Y. 516, the doctrine appears to be, and this independently of the statutes of that State avoiding wagering contracts of every sort, that a policy obtained by a party having no interest in the subject matter of insurance is a mere wager and void.

Opposed to this we have the case of the Trenton Mutual Life and Fire Insurance Co. v. Johnson, 4 Zab. 576, New Jersey, where it was determined that it was not necessary for the plaintiff, in an action on a policy on the life of another, to show that he had an interest in such life, and this, as it appears, on the ground that wagers on indifferent questions are not prohibited by the laws of New Jersey. But we abstain from further citation of these conflicting opinions, since it involves but useless labor, and turn to the Federal decisions, which next to our own, are of the most value in our discussion. Of these we have two directly in point: Commack v. Lewis, 15 Wal. 643, and Warnock v. Davis, 14 Ot. 775. In the first of these the facts are briefly as follows: Lewis insured his life for three thousand dollars, and assigned the policy to Commack, to whom he owed seventy dollars. Commack paid the first years premium, and upon the death of the assured, some seven months afterwards, received from the company the amount due on the risk. Of this he paid one thousand dollars to Mrs. Lewis, and kept the balance. To recover this money suit was brought against Commack by the administrators of Lewis, and it was held that they could recover the whole amount received by the defendant, less premiums by him paid and other offsets.

In the opinion which was delivered by Mr. Justice Miller, it was said that the transaction with Commack was a wager, that the disproportion between the debt and the amount received by him, deprived the matter of all pretence of being a bona fide effort to secure a debt; that the strength of this proposition was not diminished by the fact that Commack was to get but two thousand out of the three thousand dollars. Nor was it weakened by the further fact that the policy was taken out by Lewis and assigned to Commack.

In the second case, the facts were the decedent had, in his life time agreed with the defendants to prooure a policy on his life, they to pay the fees and assessments, and on his death to be entitled to nine-tenths of the insurance. In pursuance with this arrangement, a policy was procured and assigned to the defendant, who, after the death of the assured, received from the insurers nine-tenths of the amount due on the policy.

Here again it was held on suit by the administrators of the estate of the assured, that they were entitled to recover the money received by the defendants of the said policy.

In the opinion delivered by Mr. Justice Field, the case of Commack v. Lewis is approved, and cited as sustaining the doctrine that the assigning of a policy to a party not having an insurable interest in the life, is as objectionable as though the policy were taken in the assignee's own name.

These authorities in connection with our own, remove all hesitation concerning the rectitude of the judgment of the Court below. If, however, the question were one of first impression, and to be settled on the ground of public morality and ju-

dicial policy, we could hardly fail to reach the same conclusion. So fraught with dishonesty and disaster, and so dangerous even to human life, has this life insurance gambling become, that its toleration in a Court of Justice ought not for a moment to be thought of. The judgment is affirmed.

Haeffer v. New Era Life Insurance Company.

Of papers produced on call. the party calling may offer in evidence such as he choose. He is not bound to offer all, certainly not such as he had not furnished himself, and which he had not called for.

When the court eroneously refuses to allow a party to prove an essential part of his case, he is not bound to go on and prove the remainder of his case.

Error to the Court of Common Pleas of Adams county.

D. McConaughy and *Wm. C. Chapman, Esq.*, for plaintiff in error.

David Wills, Esq., for the defendant in error.

The action below was covenant by Heaffer against the company upon a policy on the life of Ida Flickinger for the benefit of her husband, John H. Flickinger, which policy, after certain mesne assignments, was vested in the plaintiff, with the approval of the company.

At trial the plaintiff offered the policy in evidence, proved payment of assessments, and called on the defendants to produce the proofs of death furnished them by the plaintiff; in response to the call, the defendants produced, in addition to the proofs of death, a number of letters and papers received by the company from the prior holders of the policy and counsel.

The Court ruled that the papers produced by the company should be received together and in whole, as bearing upon the question of damages claimed by the plaintiff. The plaintiff refused to offer all the papers, and non-suit was entered.

Assignment of error: The court erred in not allowing the plaintiff to give in evidence the death proofs which the plaintiff had furnished to the defendant company, and which only he called for and offered to give in evidence.

Opinion by SHARSWOOD, C. J.

The plaintiff had a clear right to show that he had complied with the condition of the policy in furnishing proofs of loss. Of the papers produced by the defendants he had a right to offer all, certainly not such as he had not furnished himself. The judge committed a manifest error in refusing to receive some unless he offered all. This was an essential part of the plaintiff's cause of action, and it was not incumbent upon him—on its being ruled out—to go on and prove the remainder of his case. It would have been an useless consumption of the public time.

Judgment reverted and *venire facias de novo* awarded.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Criminal Law—Conduct of Jury.—The use of intoxicating liquors by jurors, while engaged in the consideration of a case, will not vitiate their verdict, unless it is affirmatively shown that the party complaining has been prejudiced by the conduct of the jury. The same rule is to be applied in reference to the action of a jury in attending a theatre by permission of the court while a trial was pending. *Jones v. The People*, (Supreme Court, Colorado,) *14 Pittsburg Legal Journal*, 99.

Will—Construction of.—Where, under a will, a life estate of realty and personalty is vested, which, on the termination of the life estate is to go to the "heirs and next of kin" of the life tenant, the words are to be used in their technical sense, and the husband of the life tenant, not being an heir or next of kin to his wife, is excluded. *Abbey's Estate*, (Philadelphia O. C.) *40 Legal Intellingencer*, 416.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, NOVEMBER 15, 1883. No. 37

SUPREME COURT.

Burkhard v. Traveler's Ins. Co. of Hartford, Connecticut.

Ambiguous words in a policy of insurance will be construed most favorably to the insured.

Stepping off the platform of a car through a hole left in the floor of a bridge for repairs, is not a "voluntary exposure to unnecessary danger" within the meaning of an accident insurance policy, when the train had stopped on the bridge on a dark night, and the hole was not visible, and the assured had no notice of or reason to apprehend such danger. Exposure to a hidden danger without any knowledge of it does not constitute a voluntary exposure to it.

Neither does such an act violate the condition of the policy against "walking or being on the roadbed or bridge of any railway." The intent of this language is to exempt from responsibility for injuries to the assured from trains moving thereon, and not to avoid liability for injuries resulting from being on bridges unsafe in themselves.

Error to Court of Common Pleas No. 2 of Philadelphia county.

The action below was debt upon a policy or "ticket" against injury by accident. It was tried before a judge without a jury. The railroad train in which the plaintiff was riding, at midnight on September 12, 1880, stopped on a bridge over the Ohio river, near Louisville. The train having come to a stand-still, the plaintiff arose from his seat, went to the front platform, stepped off, and through a hole in the floor of the bridge caused by the removal of some of the planks with a view to repairs, and received a fatal injury. The policy excepted injuries caused by "voluntary exposure to unnecessary danger, hazard or perilous adventure," or "walking or being on the road-bed or bridge of any railway."

The Judge below found for the defendant, on which judgment was accordingly entered.

Assignments of error:

1. The learned judge erred in stating his legal conclusions, as contained in the following portions of his opinion filed: "The defendants would consequently be liable were it not that the policy contains two clauses—one, that the insured shall not voluntarily expose himself to danger; the other, that he shall not be on a railway track or bridge. Both of these conditions were in my opinion, broken by Leonard Burkhard."

2. The learned judge erred in deciding: "To leave a railway train in the obscurity of the night, while it is standing on a railway track over a river, is certainly an exposure to danger which, if not uncommon among the traveling community, is clearly 'voluntary' within the meaning of the policy."

3. The learned judge erred in deciding: "Nor can there be a reasoned doubt that deceased violated the prohibition against being on the track or bridge, although his stay was momentary and he fell through into the river."

4. The learned judge erred in construing strictly the harsh condition in the policy, "voluntary exposure to unnecessary danger," instead of construing it liberally, especially since said condition limits the word accident, which limitation is against the policy of the law in this class of cases.

5. The learned judge erred in not deciding, that, inasmuch as the accident proceeded from a cause unknown to plaintiff's decedent, viz, the hole in the bridge, which had been carelessly left uncovered by some workmen who were repairing it, the exposure to danger was involuntary and not voluntary.

6. The learned judge erred in declining plaintiff's second point, which was as follows:

"Should you, however, believe from the evidence adduced that, when plaintiff's decedent left the car he had full control of his senses, and merely left the same because the train had stopped, as it is customary for male passengers to do on long journeys, intending to return when notified by the railroad officials or engineer's whistle; that he was not told to remain in the car, and had no knowledge of the dangerous condition of the bridge, then it was not such a "voluntary exposure to unnecessary danger" as will ex-

cuse the defendants and relieve them from liability under the contract of insurance and the law applicable to this class of cases." Answer. "Declined."

7. The learned judge erred in refusing to find as a fact, that plaintiff's decedent, who had been sleeping nearly all the way from Cincinnati, Ohio, was half asleep or drowsy at the time of the accident; and that, inasmuch as the train was behind time, and the bridge only a few squares from the Louisville depot, he either did not know what he was doing, or thought, on the spur of the moment, that he had arrived at his destination, the Louisville depot aforesaid.

8. The learned judge erred in dismissing the plaintiff's exceptions, and entering judgments for the defendants and against the plaintiff.

Opinion by MERCER, C. J. October 1, 1883.

This case arises on a contract of insurance against injuries and death through external, violent and accidental means. The death of the intestate was so caused. The general terms of the policy are broad enough to make the company liable. It claims exemption therefrom under certain exceptions in the policy. What rule then must be applied in the interpretation of this contract and its exceptions?

The true principle of sound ethics, says Chancellor Kent, is to give the contract the sense in which the person making the promise believes the other party to have accepted it. A just sense should be exercised in so interpreting it as to give due and fair effect to its provisions: 2 Kent's Com. 557. Where a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction: 2 Whar. on Cont., section 670. Hence when an insurance company tenders a policy to a party seeking to be insured, and uses in the policy ambiguous words, these words will be held to have the meaning most favorable to the insured, as the presumption is that on this contruction he took the policy, and as the company could have avoided the difficulty by being more specific: *Vide* Fowkes v. Insurance Co., 3 B. & S. 917. The words in such case, said Mr. Justice Blackburn, ought to be construed in that sense in which, looking fairly at them, a prudent man would have understood the words to mean. It is now well recognized as a general rule, that when a stipulation or an exception to a policy of insurance emanating from the insurers, is capable of two meanings, the one is to be adopted which is most favorable to the insured: May on Insurance, sections 172, 179; Wood on Insurance, sections 141-6; Allen v. Insurance Co. 85 N. Y. 473; Western Insurance Co. v. Cropper, 8 Casey 351; White v. Smith et al. 9 Id. 186. In case of doubt as to the meaning of terms emanating from an insurance company, they are to constructed most strongly against the insurer: May on Insurance, *supra;* Fawkes v. Insurance Co:, *supra;* Wilson v. Insurance Co., 4 R. I. 156; Bartlett v. Insurance Co., 46 Maine 500: Bowman v. Insurance Co., 27 Mo. 152; Insurance Co. v. Slaughter, 12 Wall. 404; N. A. Life and Accident Insurance Co. v. Burroughs, 19 P. F. Smith 43.

The object of this company is to insure against accidents. The purpose of this policy is to pay specific damages for bodily injuries, and death caused by external violent and accidental means. The death of the intestate was so caused. The company seeks to avoid the liability under two clauses in the policy. One provides the insurance shall not extend to a case of death or injury caused by "voluntary exposure to unnecessary danger; the other that "walking, or being on the road-bed or bridge of any railway are hazards not contemplated or covered by this contract, and no sum will be paid for disabllity or

loss of life in consequence of such exposure, or while thus exposed."

The insured was traveling by rail through Indiana, on his way to Kentucky. The train stopped on the bridge across the Ohio river, by reason of the draw part of the bridge being open. He went to the front platform of the coach in which he was riding and stepped off and through a hole in the floor of the bridge, causing his death. This hole was about three feet wide and four feet long. It was caused by the removal of some planks during the making of repairs.

1. Was this act of the insured voluntary exposure to unnecessary danger?

To make him guilty of a "voluntary exposure to danger," he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous. The uncontradicted evidence shows that several other passengers got out of the coach, and some of them in advance of the insured. They certainly apprehended no danger. It is customary for male passengers to alight when a train stops for any length of time. No notice was given to passengers that it was dangerous to get out of the coach where it stood. So far as appears, the bridge, with the exception of this hole, was well covered with plank and entirely safe. When the intestate alighted other passengers were standing on the bridge near the breakman. The latter was sitting on timber that was lying on the foot-walk of the bridge, and was to be used in the repairs being made. The passengers had no knowledge of these repairs. The breakman held his lantern so placed on the floor that another timber cast its shadow over the hole, making it impossible for the insured to see it. He could see that portion of the floor lighted by the lantern, and the passengers standing thereon. He could see the breakman near them. He stepped out of the coach in plain sight of the breakman. He had a right to suppose he could land on a floor as firm as that on which the others stood. Neither word nor sight gave him notice of danger. He did not approach the opening caused by the draw and was not injured thereby.

It is true he voluntarily left the car, but a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto without any knowledge of the danger does not constitute a *voluntry* exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental. Accident is defined by Worcester to be an event proceeding from an unknown cause, or happening without the design of the agent; an unforseen event, incident, casualty, chance. And by Webster, an event that takes place without one's forethought or expectation; an event which proceeds from an unknown cause, or is an unusal effect of a known cause, and therefore not expected; chance, casualty, contingency.

In view of the unquestioned facts the death of the intestate was accidental. The danger was unknown. The injury was not designed. We think there was not such a voluntary exposure to danger as to fairly bring the act of the insured within the meaning of the exception.

2. Was he walking or being on the road-bed or bridge of the railway.

He certainly was not *walking* on the road-bed or bridge, and strictly speaking it is doubtful whether he was *being* on either. The evidence indicates that without touching either he evidently passed directly from the steps of the car through the hole in the bridge. We will not, however, put the case on the narrow ground that he did not come in contact with either road-bed or bridge. The language of the exception clearly implies two

thoughts. One, that the insured must not be on the road-bed or bridge for any length of time; the other that the prohibition is not to guard against injury resulting from a defective road-bed or defective railway bridge, but against the danger of injury from trains passing thereon. If the design was to apply the language to bridges defectively constructed or out of repair, it would not have been restricted to *railway* bridges. It would have included all bridges, both foot and wagon. The purpose is not to avoid liability for injuries resulting from being on bridges unsafe in themselves. The manifest intent is to exempt from responsibility from damage caused by collision with trains moving thereon.

The present is not like a case between a passenger and a railway company, in which the company may be exempt from liability for damages arising from negligence of the passenger, not voluntary. Nor did the act of the insured prove such a reckless exposure of his person, nor obvious risk of danger, as to bring him within the application of the rule declared in Morel v. Miss. Valley Ins. Co., 4 Bush, 535; Lovell v. Accident Ins. Co., 2 Ins. Law Jour. 877; Sawtelle v. Railway Pass. Ass. Co., 15 Blatchford 216 and kindred cases.

We therefore think, under the facts found and the rules of law which we have stated, the learned judge erred in holding that the conduct of the insured brought him within either of the exceptions, so as to relieve the company from liability.

We discover no merit in the seventh specification of error. The others are substantially sustained.

Judgment reversed, and Judgment in favor of the plaintiff for $3000, with interest thereon from the commencement of the suit, and costs.

ORPHANS' COURT.

O. C. of Luzurne County

Prince's Estate.

Personal property is the primary fund for the payment of legacies that are not expressly and exclusively charged on land; and in such case there must be a final account by the executor, showing a deficiency of assets, before entering a decree for the sale of the land for the payment of the legacies.

Proceedings for the collection of legacies charged on land.

February 24, 1883. RHONE, P.J. We have no doubt but that legacies in question are a charge on land, for the testator says they are to be "secured and paid out of the property." Wertz's Appeal, 19 Smith 173. The legacy being a charge on the land, there is no question but that this court has jurisdiction, and it most likely has exclusive jurisdiction. Downer v. Downer, 9 Watts 60; Pierce v. Livingston, 30 Smith 99. The amendments allowed are sanctioned in Downer v. Downer, (9 Barr 302) and Railroad and Canal Co. v. Bunnell, 31 Smith 414. As the legacies are not expressly and exclusively charged on the land, they come under the general rule, that they are to be paid out of the personal estate, if there be sufficient to satisfy them. Breden v. Gilleland, 17 Smith 34; Hanna's Appeal, 7 Casey 53. It follows, then, as a matter of course, that there must be an account by the executor before it can be determined whether there be a deficiency of assets. It would seem clear, too, that these legacies are not payable until the legatees arrive at age, but that they draw interest from the date of the testator's death, and hence this proceeding can only be sustained for the collection of such interest. Magoffin v. Patton, 4 Rawle 113; Bowman's Appeal, 10 Casey 19; Seibert's Appeal, 7 Harris 49; Clark v. Wallace, 12 Wright 80; Pages's Appeal, 21 Smith 402.

We, therefore, order that this proceeding be suspended until an account be filed by the executor of this estate, and until it appears that there is a deficiency of personal estate to pay the legacies.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, NOVEMBER 22, 1883. No. 38

AN APPEAL.

The LEGAL RECORD at its inception paid very little more than expenses.—When the editor became a partner in the publication of the *Daily*, the patronage it had began to diminish, and has declined ever since. For the purpose of keeping its columns of advertisements filled estate notices were kept in, in some instances, for more than six months, and newspaper advertisements inserted without authority and without pay. The following notices were then inserted to stimulate the bar to its support:

"We call the attention of our friends to the fact that a few estate notices fail to appear in our columns. As a matter of professional pride, for the covenience of brother Attorneys, and as a test of substantial friendship for the RECORD send them in."

"ARE YOU helping to sustain the RECORD by a liberal construction of the Rules of Court relating to advertising in its columns?"

These were mild appeals, and they did not stimulate. On the 23d of June, 1883, the RECORD contained another notice:

"NOTICE—The publication of the YORK LEGAL RECORD will be discontinued unless a sufficiency of patronage from the members of the bar will be extended so that it can be published without loss. The law papers in other sections of the State do not only receive the most adequate encouragement from the members of the bar, but are also given for insertion all the Register's and Prothonotary's notices of the presentation of accounts. THE YORK LEGAL RECORD is recognized throughout the State as a most excellent legal publication, and has a considerable circulation out of this county, but its continuance cannot be expected, when the editor and publisher contributes his labor for less than nothing.

This was not intended to intimidate, and it didn't.

On July 26th, we sought support from another source, and issued the following:

"THE YORK LEGAL RECORD EDITION FOR OUR BANKS, MERCHANTS, JUSTICES OF THE PEACE AND OTHERS.—The publication of the YORK LEGAL RECORD began on the 4th of March, 1880, and it is now in its fourth volume. It contains a record of cases argued and determined in the various Courts of York county, as well as neighboring counties and important Supreme Court decisions. Four pages of the RECORD are devoted to legal notices and matters of various kinds that are of interest and importance to the Banks, Merchants, Justices of the Peace, and business people generally. The subscription price of the LEGAL RECORD is $2.00 per year. We will hereafter issue a special edition of the paper which will contain everything in the regular edition except the printed cases which are of special value only to members of the bar, for the low price of fifty cents per annum.

The extra edition will contain the railroad time tables, names of the judges, the members of the bar according to seniority, the lists of the Argument, Quarter Sessions and Common Pleas Courts, with the time of their convening and duration, and the next meeting of the Court succeeding each issue of the RECORD. Also, Auditors and Commissioners' notices of the distribution of decedent and assigned estates, and of monies arising from Sheriff's sales, and the time of the presentation of their reports to our Courts. Also Estate and Insolvent notices, and a full list of the letters Testamentary and Administration granted, and assignments made, judgments entered, mortgages recorded, suits brought and executions issued, the week preceding the issue of the RECORD. Also a full list of Estate accounts filed with the date of their presentation to Court for confirmation. Also the list and dates of Widows' appraisements, Divorce notices, Sheriff's sales, Hotel and Restaurant licenses, and also all the special legal orders and decrees made by our Judges.

Much of the matter that is comprehended in this edition of the RECORD is scattered through the various newspapers of the county, and for a person to subscribe for all, so as to get all, would prove very expensive. This edition will not only prove interesting, but useful to our business-men, corporations and justices of the peace, for it will keep them posted with the affairs of the legal world, and thus apprise them of facts which are often of

great concern in their private and business relations. The RECORD will be sent by mail free of postage, or delivered by carrier to subscribers residing in York at 50 cents per year. Send in your names."

In pursuance, we distributed the LEGAL RECORD with this legal information broadcast among the merchants and banks of the county, and made a personal canvass; and instead of obtaining several hundred business subscribers, we got less than a dozen. Besides, the venture was looked upon by some as a sort of legal inquisition, and the disclosure of the financial standing of some to their injury. We were also scowled at by some of the Court House officials, who claimed that the disclosure of such information would stop all searches and thus impair their revenues. *One* officer threatened forcible ejectment if the project was continued Therefore the business edition was stopped, and the prospects of revenue which was to assist the RECORD in its support quickly vanished.

As a final appeal we respectfully ask the Court to amend the Rules of Court relative to publications in the RECORD as follows:

All administration, executors, and assignee's notices shall be published in the LEGAL RECORD three times, the charge for each notice to be one dollar, the first two to be collected by the Register at the granting of the letters, and the last by the Recorder at the time of filing the assignments; that the presentation notices of the accounts of administrators, executors, trustees and assignees shall be published in the LEGAL RECORD four weeks preceding their presentation at a cost of fifty cents each to be collected in the offices of their filing. The notice of the filing of married women's petitions for the benefit of the separate earnings act shall be inserted free. A synopsis of each tract of real estate advertised for sale by the Sheriff shall be inserted in the LEGAL RECORD four weeks preceding the sale for which the charge shall be fifty cents for each tract, to be included in the costs of sale. All other notices required to be published by the Sheriff shall be inserted in the LEGAL RECORD, except the election proclamation, the rates to be charged not to exceed those charged by other papers for advertisements of the same character.

This would make the RECORD the medium of legal information *in fact*, and confer upon it the support that is extended to other law papers of the State.—Many of them even have authority to publish all Orphans' Courts sales in full. The rates we have asked are very low, and much lower than that charged by our legal contemporaries. For instance here are the rates charged by the *Luzurne Legal Register:*

Ordinary Auditors notices, four times,	$3.00
Executor and Administrators notices, six times,	3.00
Divorce notices, four times,	3.00
Charter notices, three times,	3.00
Insolvent notices, two times,	2.50

While our rates for the same are $1.50, $1.00, $1.50, $1.50 and $1.50 respectively.

Nearly all the opinions of our Judges are copied in our provincial legal exchanges, and the LEGAL RECORD has become a recognized authority in the Courts of the State. A number of neighboring Judges as well as many foreign members of the bar are subscribers. It also enters into nearly every county law librrry in the State. Although we have had a score or more of extra copies of the first and second volumes on hand, they are all exhausted, and we are now engaged in reprinting many of the numbers to supply the demand. The LEGAL RECORD is now completing its fourth volume, and it would not reflect much credit to have its publication now stopped for want of adequate encouragement. We trust that this appeal will not, like others, be in vain.

—A covenant by which the covenanter restrains himself, generally and absolutely, without limitation as to time or place, from exercising his skill and knowledge, is repugnant to public policy and void: *Albright v. Teas*, 37 N. J. Eq.

SUPREME COURT.

Weller's Appeal.

Note—Signing of—Defence to.

M. borrowed a certain sum of money from K., and gave therefor a judgment note. This note was signed by M., and afterward, by mistake, by K., who was also the payee in the note. It was finally signed by W. as surety. Judgment was entered on the note, when K. asked to have his name stricken off as one of the defendants. To this W. objected, averring that he only signed the note as joint surety with K., and M. being insolvent, the striking off K.'s name would render W. alone liable for the whole amount. The Court below (WICKES, P. J.) struck off K.'s name, and refused to allow the judgment to be opened as to W. HELD, affirming the Court below, that K.'s name was properly struck off.

There was such an irregularity upon the face of the note as to put W. on inquiry.

Appeal from the decree of the Court of Common Pleas of York county, Pa.

Daniel Miller borrowed a certain sum of money from John Keener, and gave judgment note therefor. Under the direction of Henry Kohr, who acted as amanuensis, Keener also signed this note, which was afterward signed by Henry Weller. Miller proved insolvent, judgment was entered on the note, when the fact of Keener being both plaintiff and defendant was discovered, and the court asked to amend by striking out his name as defendant. This was refused, (see Keener *v.* Miller et al., YORK LEGAL RECORD 180,) but on a petition to open judgment, and leave Keener on to defend, his name was struck off, against the petition of Henry Weller, who averred that he only signed the note as joint surety with Keener. The Court below, WICKES, P. J., held that the name of Keener as maker, was an error apparent on the face of the note, and in the absence of any evidence of collusion between Keener and Miller, Weller must be held responsible, (see Keener v. Miller et al., No. 2 YORK LEGAL RECORD 217.

From the decree striking off Keener's name as one of the defendants in the judgment, (thus leaving Weller liable for the whole amount, Miller being insolvent) Weller appealed to the Supreme Court.

PAXON, J. This was an appeal from the refusal of the Court below to open a judgment entered upon a warrant of attorney. It was not denied that the appellant was a surety, and that when he signed the note it had attached to it the names of John Keener and Daniel Miller as makers. In point of fact Keener was the payee, Miller the principal and the appellant his surety. It was alleged by the appellee that the name of Keener as maker was signed by mistake, and upon his own motion the Court below subsequently amended the record of the judgment by stiking out his name, leaving it to stand as a judgment of John Keener v. Daniel Miller and Henry Weller. This amendment and the refusal of the Court to open the judgment are assigned for error.

It was urged that the amendment came within the second section of the Act of 4th May, 1851, P. L. 574, which provides: "That all actions pending or hereafter to be brought in the several Courts of this Commonwealth, and in all cases of judgments entered by confession, the said Courts shall have power in any stage of the proceedings to permit amendments by changing or adding the name or names of any party, plaintiff or defendant, whenever it shall appear to them that a mistake or omission has been made in the name or names of any such party."

The Act of 12th April, 1858, P. L. 243, declares that the second section of the Act of 1852 above cited "shall be so constructed as to authorize the said Courts whereby reason of there being too many persons included as plaintiffs or defendants by mistake, as will prevent the cause from being tried on its merits, to permit an amendment by striking out from the suit such persons as plaintiffs or defendants."

Statutes of amendment very properly receive a liberal construction. But amendments which deprive the opposite party of any valuable right should not be allowed. Kille v. Ege, 1 Norris 102.

Has the appellant been injured by the amendment or deprived of any valuable right? He alleges that he signed the

note on the strength of Keener's name, knowing him to be responsible. Even if this be so, appellant would not be relieved unless some fraud was practiced upon him. It is not pretended there was any collusion between Keener and Miller. The appellant knew when he signed the note that he was becoming bail for Miller. He knew the latter expected to raise money upon the note. If he had read the note he would have seen that Keener was the payee. This of itself was sufficient to put the appellant upon inquiry. It is true the note of Keener to his own order was regular, and might have passed from hand to hand without comment. But when Miller took such a note to appellant and asked him to become bail for him (Miller) upon it, the case is widely different. As before stated, the object of the transaction was to enable Miller to get the money from some one. From whom could he get it but Keener? The note was payable to his order, and could not be used without his endorsement. A man of ordinary intelligence could not have been deceived by Keener's name appearing on the note as maker. In any event there was such an irregularity as to put appellant upon inquiry. If he had made such inquiry he would have ascertained the truth, that Miller was to get the money from Keener, and that he (appellant) was becoming bail for Miller to Keener.

That the appellant was an illiterate man and understood the English language imperfectly does not affect the case in the absence of any fraud practiced upon him. No one is bound to sign an instrument which he does not understand. If, however, he does sign it without asking to have it read or explained to him, he is bound by it: Thoroughgood's case, 17 P. F. S. 389. The Courts have gone far enough in relieving men of their obligations upon the plea of ignorance. The appellant intended to become bail for Miller. He might have known if he had asked the question, that the money was to come from Keener. This would have made it clear that the signature of the latter as maker was a blunder.

We find no error in this record.

Judgment affirmed.

Township Supervisors—Powers of—It is within the general powers of township supervisors to contract for the erection of a township bridge in place of one destroyed by a freshet.

One who contracts with supervisors to build such bridge is not bound to inquire of the taxpayers whether they owe road taxes and whether they desire to pay them by work on the proposed bridge.—*Orland Township v. Martin*, 14 Pittsburgh Legal Journal, 127.

Affidavit of Defence—Sufficiency of—In passing on the sufficiency of an affidavit of defence, the material averments of fact therein must be accepted as true—*John Ecoff et al. v. R. Gillespie*, 14 Pittsburgh Legal Journal, 127.

Replevin—Distress—Where a party claims title to goods under a sale upon a distraint for rent, he must prove affirmatively that the necessary legal notice of the distress was given to the tenant, and that the sale was duly advertised.

The presumption that preliminary steps taken by a public officer in doing an act have been regular must be limited to his acts as an officer; it does not apply to his precedent acts done as an agent and it is incumbent upon the party asserting them to prove they were done.—*Murphy v. Times Printing Association et al.*, 12 Luzurne Legal Register, 365.

Satisfaction upon old mortgages.—The court has no power to decree the satisfaction of an old mortgage except upon proof either that the mortgage has been paid or that there has been sufficient lapse of time to raise a legal presumption of payment.—*In the matter of the Petition of J. M. Broomall for the satisfaction of an old Mortgage.*—1 Weekly Reporter 548.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, NOVEMBER 29, 1883. No. 39

QUARTER SESSIONS.

Q. S. of Delaware County

Commonwealth v. Springer.

Husband and Wife—Right of wife to exclude her husband from her house.

When a wife, who owns the house she lives in, forcibly prevents her husband from entering, he has no remedy except divorce.

A husband will be required to give security to keep the peace when the wife testifies that she is afraid of bodily injury in case he succeeds in affecting a threatened entry to her house, the title to which she holds in her own name and from which she has excluded him.

Surety of the peace in which Mrs. S. M. Springer was plaintiff and her husband George F. Springer, the defendant.

It appeared by the testimony taken on the hearing that while the defendant was absent on a gunning trip the plaintiff locked the house against him and on his return refused him admittance. That the plaintiff held the title to the real estate in her own name. The defendant endeavored to enter the house and, failing in that, sent a letter to the plaintiff which closed with the words, "I will give you until the first day of January next to comply—if not settled by then I will take possession peacefully if I can, forcibly if I must." The plaintiff then had him arrested and bound over by the Justice to keep the peace.

November 5, 1883. CLAYTON, P. J.—The wife of the defendant makes oath that he has threatened to forcibly break into her dwelling house. That she has separated from him and does not desire to cohabit with him. That the house in which she lives is her own separate property in which he has no interest whatever except such as the law bestows upon him as her husband.

He, upon the other hand, alleges that he left his home temporarily upon a gunning excursion, with no intention of permanently separating from his wife. That upon his return in about a week or ten days he found the doors shut against him, and upon attempting to enter was forbidden to do so. Some abortive efforts at a reconciliation were made which ended in a written missive making a peremptory demand for restoration to his married rights and winding up with the threat that if he could not be restored peaceably he would enter forcibly. This was followed by his arrest and binding over to keep the peace.

The wife positively swears that she is in mortal dread of personal violence if he should attempt to forcibly enter her house and claims the protection of the law by requiring him to find sureties of the peace.

The single question is, can a wife exclude her husband from the right to eat at her table, ride in her carriage, and sleep in her bed? While the relation of husband and wife continues in its normal condition and there is no rupture of those relations, or separation between the parties, it is admitted the husband possesses all those privileges.

However unwilling he may be to such a summary divorce from his wife's bed and board, and the comforts of her society and enjoyment of her property, we can see no way to ensure him those rights and comforts by force. The right may exist but the remedy is by making himself agreeable to her rather than by resorting to force and arms. He perhaps may use actual force as between him and her so long as he does not injure her person, destroy her property or break the public peace. The latter is of paramount importance and must be preserved regardless of the consequences to mere private rights.

The difficulty here presented did not exist at common law: it has grown out of the Married Woman's Act. If she is strong enough to turn her husband out of her house or, after he has voluntary left it, she can successfully bar the doors against him so securely as to require actual force and a breach of the public

peace to effect an entrance, I am inclined to the opinion that his only remedy is to seek another home, invite her to share it with him, and upon refusal subject her to the pains and penalties of wilful desertion. In such case he could either refuse to contribute to her support, and preserve his right of courtesy in her estate by denying her a lawful divorce, or, if he desired it, he could successfully break the bonds of matrimony and seek a more congenial wife.

In the Commonwealth v. McGolrick reported in 1 Del. Co. Rep. 446, we held the husband to keep the peace in a somewhat similar case. To attempt to break into her house by force would result in a forcible resistance by her, her friends, mercenaries and coadjutors. No personal valor of his could overcome such troops. This would require an accumulation of additional forces, munitions and muniments of war upon his part, ending in riot and bloodshed requiring peradventure the interference of the militia, army and navy of the Commonwealth. The dreadful consequences of matrimonial infelicity to the Old City of Troy admonishes us to nip the germ of strife in the bud by holding the husband to keep the peace and be of good behavior.

The same question has recently arisen in England in another form. In that case the wife sought relief in Equity and the Chancellor interfered by injunction restraining the husband from entering his wifes house. The case is now up for review before the House of Lords, and a final decision is awaited by the profession with more than ordinary interest.

Let the defendant enter his own recognizance with surety in three hundred dollars to keep the peace, &c., and pay the costs.

COMMON PLEAS.

C. P. of Chester County

Stott v. Irwin.

Record Liens—Omission of Initial Letter in Defendant's Name—Effect of.

The omission of the middle initial of a defendant's name, in a mechanic's lien, will postpone the lien to others correctly entered with the initial.

Distribution of proceeds of a sheriff's sale under lev. fa. sur. mort., No. 12, August Term, 1883.

October 29, 1883. FUTHEY, P. J.—If we take the liens as they stand upon the records, with the facts agreed upon by the parties to this controversy, the mortgage of Stott is entitled to priority in the distribution.

The land was conveyed by Stott to Reuben H. Irwin, and his mortgage taken at the time of the conveyance for $220, of which $120 was for purchase money of the land conveyed, and the mortgage was recorded three days after its acknowledgment. The mechanic's lien of Ash, which claims precedence, was entered against Reuben Irwin. Had this lien been entered against Reuben H. Irwin, which was the correct name of the owner of the land, it would, in the distribution, have taken precedence of so much of the mortgage of Stott as was not for purchase money. It was not entered, however, against Reuben H. Irwin, but against Reuben Irwin. The middle letter of the came nowhere appears, either on the lien, the record of it, or the index. The authorities hold that where a lien is thus defectively entered, while it may be, and generally is, good as between the parties, the omission of the middle letter of the defendant's name is fatal to the lien as against purchasers and lien creditors, unless they have actual notice. (Wood v. Reynolds, 7 W. & S. 406; Esther Hutchinson's Appeal, 11 Nor. 186; King v. King & Miller, 2 Ches. Co. Rep. 47; Perkins & Miller v. Nichols, Ib. 88; Trickett on Liens, sec. 55, 230, 231.)

While in mechanics' liens, critical ac-

curacy is not always required and considerable latitude is allowed, yet there must be such convenient certainty as will give notice to persons interested. In Knabb's Appeal, 10 Barr, 186, the correct name of the owner appeared, both in the title of the claim and in the annexed bill, but the initial letter of the middle name was omittad in the body of the claim. It was held that this discrepancy was immaterial, the record being sufficiently certain in giving the correct name in the title and bill. In the case we are considering, as we have said, the correct name nowhere appears, and we see no reason, in the point here presented, for a distinction between mechanics' liens and judgments.

It is claimed, however, on behalf of the mechanics' lien, that the debt of Stott was created before the entry of that lien and that therefore he did not rely on the record in making the loan. We do not see that this makes any difference. When Stott took the mortgage, the record contained no notice of the liens. True, he took it, so far as that portion of it not for purchase money is concerned, subject to any mechanic's lien which might exist by Act of Assembly, and which might be preserved and continued beyond the six months by filing and entering of record a lien, as provided for by the act. But at the expiration of the six months, a search would have failed to show any such lien against the defendant, and Stott had a right to conclude that the property, which he may have supposed free from lien when he made the loan, was, in fact, free, and never had been subject to liens other than that to himself. He had a right to rely upon the records, which when he took the mortgage, contained no notice of lien, subject simply to the evidence they might thereafter, in proper time, exhibit, that there was a statutory lien, which, in fact, preceded the mortgage. The records thereafter furnishing no evidence as would be notice to, or affect, a lien creditor, and there being no evidence of notice to Stott at the time of filing the mechanics' lien, he had a right to rely on the records as they stood when he made his loan, and to rest in the belief that he had a first lien, and to take no steps for his greater security.

The moneys in the hands of the sheriff will be distributed and paid out as follows:

To Rachel J. Stott, executrix of Joseph W. Stott, amount due on judgment sur mortgage and interest, - - -	$278.12
To Thos. A. Ash, balance, -	20.56
Total,	$298.68

C. P. of Luzurne County

Smythe v. Morgan.

Certiorari—Justice of the Peace—Short Summons.

A summons issued on the 23d, returnable on the 27th of the month, and was returned served on the 23d by leaving a copy at the dwelling house of the defendant in presence of another: HELD, that upon this state of the record this issuing of a short summons was irregular.

September 17, 1883. RICE, P. J.—The summons in this case issued on April 23, 1883, and was returnable on April 27, 1883. There is nothing on the face on the transcript, nor in the precept, to indicate that the defendant below was a non-resident of the county. Indeed, the return to the summons indicates the contrary. It reads as follows: "Served the within summons the 23d day of April, 1883, by leaving a copy at the dwelling house of the defendant, James Smythe, in the presence of Mrs. C. M. Steele." Clearly, this was not a case for a short summons, and, therefore, the proceedings must be reversed. Ferris v. Leidler, 5 Phila. 529. If the defendant below was, in fact, a non-resident of the county, it should have appeared either on the transcript or the precept. We also suggest that the return itself does not follow the statute as strictly as it should.

The proceedings were reversed and set aside.

SUPREME COURT.

Johnson's Appeal.

An absolute transfer of a man's property in trust for the payment of his debts will be regarded as an assignment under the Act of 1836 without regard to the particular form of conveyance, but a mortgage in trust to pay off certain notes at the time to which the creditors had extended the time of payment is not an assignment.

Appeal from Court of Common Pleas of Montgomery county.

May 21, 1883. PAXSON, J.—The court below held that the mortgage in the controversy was not an assignment for the benefit of creditors within the meaning of the Act of June 14th, 1836, entitled "An Act relating to assignees for the benefit of creditors and other trustees." The court further ruled that it had no jurisdiction to distribute the money realized upon the mortgage from a sale of the mortgaged premises, but that the distribution must be made in Philadelphia where the trustee resides.

If we concede the first proposition to be correct the second follows logically. We have therefore presented the single question whether the mortgage was in effect an assignment under the Act of 1836.

The recent case of Wallace & Krebs vs. Wainwright & Co., 6 Norris 263, contains much of the learning upon this branch of the law, and it would be useless to repeat what was there said, or to again review the authorities there referred to. In Wallace & Krebs the debtor assigned a number of judgments to his attorneys in payment of the creditors of the assignor, naming them. There was an implied trust, and that the assignment came within the Act of 1836.

The principle to be deduced from the authorities is, that the form of the transaction is not material; the law cannot be evaded "by any sham departure from the general form of assignments:" Fallon's Appeal 5 Wright 235; hence an absolute transfer of a man's property in trust for the payment of his debts, must be regarded as an assignment within the Act of 1846, without regard to the particular form of conveyance. But it must be an assignment or transfer of property. Judgments confessed to secure creditors are not such preferences as are avoided by the Act of 1843, although an assignment for creditors was intended and was shortly afterwards executed: Blakey's Appeal, 7 Barr 449.

We are of opinion that the mortgage in this case was not an assignment for creditors under the Act of 1836. That it was not intended as such by either the mortgagors or the mortgagee is too plain for argument. Nor has any of the creditors intended to be benefitted thereby ever treated it as such. The facts connected with it briefly stated, are, that Main Brothers, residents of Montgomery Co., becoming embarrassed in 1875, obtained an extension of twenty-four months from their creditors, and in order to secure their liabilities thus extended, executed the mortgage in question upon their real estate to the appellant as trustee. The consideration of the mortgage was the extension, and had the extended paper been paid at maturity the condition of the mortgage would have been performed, and the mortgagors entitled to have satisfaction entered of record.

There is no room here for an allegation that the mortgage was intended as an evasion of the Act of 1836. It was a security for the creditors precisely as if the mortgagors had given indorsed paper or other personal security to procure an extension. Moreover, the mortgage was not an absolute transfer of any thing; it was a mere pledge of security.

In this it lacks one of the essential features of assignments under the Act of 1836. For in all the instruments which have been held to be assignments for creditors there has been in some form an absolute transfer of the property. The assignor parted with all his title and control thereof, save alone the right to have any surplus re-conveyed to him that might remain after the payment of his debts.

We are of opinion that the learned judge below ruled this case upon correct principles.

The decree is affirmed and the appeal dismissed at the cost of the appellant.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, DECEMBER 6, 1883. No. 40

SUPREME COURT.

Geo. W. Moninger v. Henry Ritner.

The Act of 14th May, 1855, (feme sole traders) secures to the wife taking advantage of it the privileges of the Act of 22d February, 1718, and the absolute and unqualified right to dispose of her own property, real, personal by sale or will

Marriage does not give the husband a vested right to curtesy in the wife's estate.

Error to the Court of Common Pleas of Washington county.

Henry Ritner, the defendant in error, brought an action of ejectment in the court below against G. W. Moninger to recover a lot of ground in Washington borough on which a large two-story brick house had been erected by Mr. Moninger's vendor, David Aiken. On the trial the plaintiff proved his marriage to Ellen Jones in the year 1834. The defendant admitted that the title to the property in controversy was out of the Commonwealth and in Martha Poole, and that Martha Poole, by deed dated July 30, 1860, and recorded the same day, had sold and conveyed the same to Ellen Ritner. After evidence was offered as to mense profits the plaintiff rested. The defendant then offered in evidence the record in the same court, to No. 63 December Term, 1873, showing an application of Mrs. Ellen Ritner for the benefits of the Act of 1855, relating to *feme sole* traders, and the granting of the decree to her, giving her all the rights and benefits of that act, to be followed by evidence of the conveyance of the property to David Aiken and by David Aiken to the defendant. This offer was overruled and bill sealed for defendant. The defendant then offered the record and decree, setting it forth in full in the offer, to be followed by conveyances as above and evidence that the desertion alleged in the record had continued down to Mrs. Ritner's death, and that during such desertion the plaintiff had lived in adultery with another woman. This was overruled and bill sealed for defendant.

These offers were objected to by the plaintiff on the ground that, by the marriage of the plaintiff in 1834, he acquired a *vested* interest in all the real estate his wife then owned or might acquire during coverture, and although his wife did not acquire the property in controversy until five years after the Act of 1855 was passed, still he had a vested constitutional right of property which the Act of 1855 could not disturb.

The court charged the jury that the verdict must be for the plaintiff. They so found and judgment was entered upon the verdict. The defendant took the writ, assigning for error—

1st. Overruling defendant's first offer, which was as follows: "Defendant offers in evidence record to No. 63 December Term, 1873, for the purpose of showing that Mrs. Ellen Ritner was declared a *feme sole* trader and entitled to all the provisions of the Act of 1855, to be followed by evidence that she conveyed the title to David Aiken, and that David Aiken conveyed the title to George W. Moninger, the present defendant."

2d. Overruling defendant's second offer, which was as follows: "Defendant offers to prove that at No. 63 December Term, 1873, of this court, Mrs. Ellen Ritner, wife of the plaintiff, presented her petition to the court, alleging that Henry Ritner, her lawful husband, had, without cause, wilfully abandoned her about 1867; that the said petition was supported by her own oath and the evidence of two disinterested witnesses; that in pursuance of the said petition, after notice by publication, the court, upon the 21st of October, 1873, granted the following decree: "And now, October 21, 1873, on the petition of Ellen Ritner, of the borough of Washington, said county, sustained by the testimony of two witnesses, and it appearing to the court that the facts set forth in the petition are true, and that notice of this application has been given as directed by said court, and being satisfied of the justice and propriety of the application

the court made a decree and granted the said Ellen Ritner a certificate that she shall be be authorized to act and have the power to transact business as a *feme sole* trader, and that creditors, purchasers and all persons who may with certainty and safety transact business with her the same as though she had never been married. By the court, J. P. Miller, Prothonotary; to be followed by the evidence that in pursuance of this decree Mrs. Ellen Ritner, by deed dated January 29, 1874, recorded same date in 4 Z, page 134 in consideration of one thousand dollars, conveyed the property in this dispute to David Aiken, to be followed by evidence that David Aiken erected valuable improvements thereon, and that on the 6th day of April, 1875, he sold and conveyed the same property to George W. Moninger, by deed recorded April 9, 1875, 5 C, page 163, Recorder's office, in consideration of seven thousand eight hundred and eighty dollars, and that the defendant has made valuable improvements on the premises; to be followed by evidence that the plaintiff deserted his wife in 1867, that he left the State, and lived in adultery with another woman, that this desertion continued down to the date of the death of Ellen Ritner; this for the purpose of showing that the plaintiff has no title to the property in dispute."

November 5, 1883. GORDON, J. The plaintiff below claims title to the property in controversy by virtue of his right as tenant the by curtesy in the estate of his deceased wife, Ellen Ritner, who died sometime in July, 1880. As she was seized of the lot in dispute during her coverture, were there nothing else in the case, his right to have and hold it during the term of his natural life, could not be successfully controverted. But on part of the defense there was an offer made to show that on the petition of Ellen Ritner, setting forth the fact that her husband had, without cause, wilfully abandoned her, the Court of Common Pleas of Washington county, in pursuance of the Act of the 14th of May, 1855, made its decree, on the 21st of October, 1873, constituting her a *feme sole* trader, and had issued to her a certificate to that effect. That being thus fully empowered to dispose of her property as though she were *sole*, she, on the 29th of January, 1874, conveyed the lot in dispute to David Aiken in fee, who afterwards conveyed to George W. Moninger, the defendant. This offer was refused, and the jury instructed to find for the plaintiff. In this intrepretation of the law, and disposition of the case, we cannot agree with the court below.

Taking that offered as proved, we cannot see why it should not determine the controversy in favor of the defendant. The Act of 1855 is so plain, positive and unambiguous in its terms, that no one need, for one moment, hesitate concerning its design and intention. It secures to the deserted wife not merely the rights and privileges of a *feme sole* trader, under the Act of 1718, but it also confers upon her the absolute and unqualified right to dispose of her own property, real and personal, as to her may seem best, and further provides, that in case she dies intestate, such property shall pass to her next of kin as though her. husband were previously dead. About the fact, therefore, that Mrs. Ritner had the right, so far as it could be conferred upon her by this statute, to sell the property in question, unencumbered by her husband's curtesy, there can be no doubt. Moreover, of her power so to sell and dispose of this property, the certificate issued to her by the Common Pleas is, by the sixth section of the act above recited, made conclusive evidence, and so continues to be until it is revoked by the authority from which it emanated. It follows, that the court below, in ruling out the offer of the defendant, disregarded a plain and positive injunction of the General Assembly. But the counsel for the plaintiff below interposes the plea that Ritner, having been

married to his wife Ellen, before the passage of the Act of 1855, had such a vested right, not only in the property which she then had, but also in that which she might afterwards acquire during their marriage, that the Act of 1855 was, as to him, unconstitutional and void. In other words, such was the inherent power of the marriage contract, that, without, regard to the performance of that contract on his part, the peculiar rights acquired at its inception, could not be abridged, altered or modified by any power short of his own will. But the statement of this proposition is its own refutation. The very premise on which the act is founded is that the marriage contract has been violated; that the husband has deserted his wife, and refuses to support and maintain her. It is, therefore, a curious travesty on the constitutional powers of this Commonwealth to say that the Legislature can make no provision for the support of an abandoned wife, if such provision happens to impinge upon some married right of the derelict husband. But independently of the arguments which may be drawn from the nature of, and duties involved in, the marriage contract, in favor of the constitutionality of the Act of 1855, there is, in fact, no foundation on which to rest the attempted justification of the judgment of the court below. Ritner's right to curtesy in his wife's estate was no part of the marriage contract, but it resulted from the operation of statutory enactments existing at the time of her death. This point was expressly ruled, in reference to a wife's dower, in Melezet's Appeal, 5 Harris 449, and we take it for granted that no one will insist that the right of curtesy is superior to that of dower. In that case it was contended that the Act of 1848 was unconstitutional, in that the rights of the wife are fixed and vested at the time of marriage, and that this act essentially changed and interfered with those rights as well as with those of the husband.

But, in answer, it was objected, that, in this Commonwealth, laws had from time to time been passed altering the statutes of distribution, and the manner of making of wills and that such laws had always been considered sound and good, if in operation at the time of the decedent's death, without regard to whose inchoate interests they might affect. It was further said, that the Legislature might, at its discretion, altogether abolish the common law right of dower, and repeal the statute of wills. But this doctrine has peculiar force when applied to the facts in the case in hand, and the error of the court below becomes all the more obvious. Mrs. Ritner's title to the property in dispute had no existence until after the Act of 1855, and until the acquisition of that title Ritner had no right in the premises inchoate or otherwise. The Act of 1855 could, therefore, not interfere with Ritner's vested rights in and to the subject-matter of this controversy, for in it he had no such rights. On the other hand, whatever rights he may have had therein he held in subjection to the then existing laws. Whether, then, we adopt the full text of the case above cited or not, the Act of 1855 certainly is, as to the plaintiff's right, constitutional and of full force, and ought so to have been regarded in the court below.

Our attention has been called to the case of Ayetsky v. Goery, 2 Brewster 302, as ruling the contention in hand in favor of the judgment below. But as the facts of the case are not given it is impossible to say whether it has any applicability to the case before us or not. If, indeed, the counsel for the plaintiff in error has properly stated the facts upon which that case was based, it certainly does not, as to the present contention, support the argument of the counsel for the defendant in error.

The judgment of the court below is now reversed and a new venire is ordered.

COMMON PLEAS.

C. P. of Delaware County

Malin v. Worrall.

Trespass—Easements.

Where rain water has been accustomed to flow evenly from the lands of one over those of his neighbor, mere user will not give to the latter the right to have the even flow maintained.

A land-owner cannot so change the natural conformation of his land as to throw in a body, upon his neighbor's land, water which has been accustomed to flow evenly over the surface.

Motion by defendant for a new trial.

The facts in this case appear sufficiently by the opinion of the court.

November 5, 1883. CLAYTON, P. J.— This was an action of trespass for entering the plaintiff's grounds and opening trenches or ditches at four distinct places, and, by causeways built upon defendant's private roadway, causing the surface water from rains to flow into the plaintiff's fields.

The action was brought expressly to try the right. From the natural slope of the ground before the road was built, the rain water would flow regularly over the plaintiff's fields along the entire line, but at no one place more than another. There was no evidence that before the building of the road the water flowed in any given channel. The evidence was that the rain water not absorbed while on the defendant's land would flow regularly and evenly over the plaintiff's field.

If such a flow would be advantageous to the plaintiff, it has been well settled that he could not compel the defendant to keep up the level of his land for the purpose of continuing the flow, nor could he even by continuous use acquire the right to have it continue to so flow upon him. The reason is obvious. He is not supposed to consent to maintain the conformity of the surface of his ground in *statu quo*. All he is required to do is to let the water take its natural course upon his own land and accommodate its flow to the changes in the conformation of the surface by Nature. But if he builds or improves his land by which its natural conformation is changed, he must not throw the water in a body upon his neighbor without his consent. Much less can he enter upon his ground and dig a ditch to carry off the water from his own ground: Gale & Whalley on Easements, 182.

While, therefore, the plaintiff could not compel the defendant to use his land as to give him the benefit of the accustomed flow of rain water, neither can the defendant gather it in streams, or dam it up on his own land, so as to discharge it in a body on the plaintiff. He can let it flow upon his own land in its acquired channels until it finds a natural outflow on the plaintiff's, but he cannot help it to an outlet until it finds its natural flow. This is very old law. The Romans recognized it in their Urban Servitudes, and their doctrine of the rights of *flumen* and *Stillicidium* did not materially differ from the English Common Law. The civil as well as the English law prohibited a man from projecting his roof so as to throw the rain water upon his neighbor. He was required to construct his building so as to carry water upon his own land. Ib. 176.

The great question in this case was, whether the defendant had acquired the right by user. The jury have found that he had not. The only reason urged for a new trial is that the court erred in not charging the jury that the defendant under the evidence had to do all he had done without *grant* or *user*.

The court was asked to say, that one of the consequences of a lawful use of his lane was the wearing away of the surface, and this he could lawfully prevent, in whole or in part, in some places and not in others, as the proper use of his lane required; and if by these means the places of entrance of the water on the plaintiff's land became changed the defendant is not responsible if he did more than keep his lane in proper repair.

In his argument upon this point, the learned counsel contended that the defendant had the right to select the four places in his lane and by building causeways there keep up the natural level of his ground, letting the rut wash away, and, by building these causeways, make the water which formerly flowed upon the plaintiff along the entire line, flow into his field in an accumulated stream.

We affirmed the point, but informed the jury that if one of the consequences of the building of the road was to change the natural even flow over the plaintiff's ground and to cause it to run down the side gutters until it found its natural outflow, he had no right to build the causeways for the purpose of damming the water and throwing it in a body on the plaintiff. The jury was also charged that if the water ran upon the plaintiff's land of its own volition the defendant would not be responsible for the damage it might do, but he could not build the causeways and open the ditches on the plaintiff's land for the purpose of throwing the water in a body on him.

Upon a careful review of the whole case we are satisfied the law was correctly stated, and as the case was fairly and exhaustively tried, the verdict must stand.

Rule discharged.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, DECEMBER 13, 1883. No. 41

COMMON PLEAS.

Rigney v. Pennsylvania Railroad Co.

Railroad—Contributory Negligence.

A brakeman in the employ of defendant company, was ordered on a car that was being run into a switch. The brakes on the car being defective, he was unable to stop it, and met with an injury which resulted in his death. In an action brought by his widow and minor children, HELD, That plaintiffs could not recover.

It was a rule of defendant company that the brakeman should examine brakes before cutting a car loose from a train, and decedent had been so told by the conductor. HELD, his failure to do so was such contributory negligence as to relieve the defendant from liability.

The brake chain having been unhooked, at a station along the line, by persons unknown, the defendant company was not liable for injuries received thereby, the decedent having neglected to examine said brakes before getting on the car.

Motion for compulsory non-suit.

This was an action of trespass, &c., brought by Catharine E. Rigney and her minor children against the Pennsylvania Railroad Company for the death of her husband by injuries received while in defendant's employ.

Deceased was a brakeman, and while acting in that capacity was ordered on a car which was being shifted on a side track. The brake chains being torn, he was unable to stop the car, and received injuries which resulted in his death.

H. Keesey and *V. K. Keesey*, for motion.

Niles and *Niles*, contra.

Dec. 8, 1883. WICKES, P. J.—Before the plaintiffs can recover, they must show that the company defendant was guilty of negligence, and that the conduct of the deceased or of his coemployees in no degree contributed to the accident.

It is not pretended that, the company defendant was guilty of negligence in directly furnishing the deceased machinery or appliances inadequate for the work he was to perform, or omitted to exercise proper care in the employment of persons who constructed the machinery or who aided the deceased in the execution of his duties.

The contention is that the defendant failed to keep the machinery in proper repair, and that there was no omission of duty on the part of the deceased or his coemployees in not inspecting the brake before using it. The car upon which this most unfortunate accident occurred had been left at Spring Grove station the evening before. There is nothing in the evidence to show that it was out of repair at that time, or that it had carelessly inspected at either of the company's yards where inspection was provided for. There were three such yards on this division of the road—viz.: Columbia, York and Frederick. Everything points to the conclusion that the brake was unhooked, during the time the car remained on the switch. This brake was not broken in any proper sense of the term, but "unhooked" midway of the car, and thus its efficiency destroyed at both ends of the car. The defect was patent, and readily observed by all who examined it.

Was it, under these circumstances, the defendant's duty to have some one at this station, charged with the special duty of inspecting cars temporarily left there. If at this station, then of course at all other stations where cars are taken on and put off, and at every other point, where the ordinary use of the car, or the act of a tresspasser, the brake chain might become disconnected. I can but think this would be holding a company to such a high degree of care, as the law never requires. But such a contingency as this was manifestly seen and provided for, by the rules of the company defendant which were given in evidence.

By one of these rules, it made the conductor's duty "to see that the brakes of the cars in their train, are in good order before starting, and to inspect them as often as the train stops to take water, or lays off to pass other trains." And another rule makes it the duty of the brakeman to aid the conductor in making such inspection. It is said these rules do not apply to the case in hand, because the

car on which the accident happened, was not a part of the train.

When we remember the character of the duties these employees were engaged to perform, this seems but a narrow construction of the rules. They were running a "mixed train," and shifting cars at various stations. At this particular station they were collecting empty coal cars, for the freight train "coming this way."

In order to get at the empty cars, they were compelled to "shift" this box car, and in the general scope of their duty it surely became for the time being a part of the train, sufficiently so at all events, to be covered by rules, manifestly intended to promote the safety of those engaged in this kind of work.

But it is contended, that even supposing the rules in question applicable to the facts of this case, that the company defendant cannot relieve itself of liability, by imposing the duty of inspection upon the conductor and brakeman. If inspection means simply ascertaining whether a brake is in order before it is used, which may be done, according to the evidence, by either looking at it, or trying it, I cannot agree that such is the law. Surely those who accept this service are something more than automantons. As we before said, the defect in this instance was patent—it was readily seen by several persons, and could, according to the evidence, have been instantly discovered by trying it. In addition to this, it is in evidence, that the conductor of this train told the deceased, "never cut a car loose without trying the brake." Had this instruction been obeyed the accident would in all probability not have happened. Not to obey this order was negligence on the part of the unfortunate man who was killed, and directly contributed to the accident. It can scarcely be said that *this order* did not apply—because the car was first attached, and afterwards "cut loose"—it therefore came directly within its terms.

True as was argued the conductor ordered the deceased on the car, and gave him no time to try the brake.

That the conductor ordered him on the car is in evidence—but it had not been shown, as I remember the facts, that he had no sufficient time in which to test the brake. But assuming that it is all true as alleged, how does it help the plaintiff's case.

The conductor and brakeman, served a common master and were engaged in the performance of a common duty—I can but think they were fellow servants within the literal and legal meaning of the term. The rule is well settled, which discharges the master from liability, when the injury results from negligence of a co-employee.

Upon the plaintiff's evidence therefore, we find a case of contributory negligence on the part of the deceased, even assuming negligence to be proved on the part of the defendant, of which however there is not sufficient evidence to justify a verdict. We therefore enter judgment of non-suit.

C. P. of Lancaster County

Lemon et al. v. Reidel.

Municipal Corporation—Ordinances—Caption in suit for action in penalty.

In an action to recover a penalty for violation of municipal ordinances, the suit must be brought in debt, and where the whole penalty is payable to the municipality, it must be brought in the name and title of the corporation, and not in the name of the informer.

Penal actions must be construed strictly, and cannot be so extended as to give authority, in the absence of express words, to the peace officer to sue in his own name.

The transcript of the alderman must set forth the offense and ordinances violated with sufficient clearness and precision. Every essential ingredient of the offense must be set out by the magistrate. The ordinance, if not in haec verba, should be designated by number, section or date of passage.

Where these ingredients are omitted, the judgment will be reversed.

Certiorari upon the proceedings of Alderman A. F. Donnelly.

June Term, 1883. No. 53.

On May 25, 1883, B. F. Lemon, a police officer, brought suit against C. Reidel for violating the market ordinances of the City of Lancaster.

On May 31st, a hearing was had before the alderman, and judgment was entered against defendant for $10, the amount of the penalty, and costs of suit. On the 6th day of June, the defendant's counsel issued this certiorari of the proceedings to this Court.

November 17, 1883. PATTERSON, A. L. J.—On consulting authorities and inspecting the transcript of this suit returned by the Alderman, we regret that although the motives that impelled the initiation of this action were those properly influencing a public officer, and although the ordinance of the City of Lancaster upon which it is based is one of the most salutary and beneficial ordinances to the citizens, yet, nevertheless we are compelled to set aside this judgment. The ordinance which the defendant is charged with violating, is contained in Sections 11 and 12 of the ordinances passed March 10th, 1870, (City Ordinances, page 110.) With others, it ordains, "That no person shall, under any pretence whatever, purchase on market days, within market hours, any marketable provisions for the purpose of retailing or reselling the same" etc., and Section 12 says, "That any person violating any of the provisions of the ordinances relating to the markets, shall forfeit and pay for the use of the city a fine not exceeding ten dollars."

This suit was properly brought as an action of debt to recover the penalty, but it was brought thus: Officer B. F. Lemon, who sues as well for himself as the Mayor, alderman and citizens of Lancaster v. C. Reidel, defendant." It should have been brought in corporate name of the city, which name, since the Act of April 4th, 1867, an act entitled "An Act amending the charter of the municipal corporation of the City of Lancaster and dividing the same into nine wards," is the "City of Lancaster." This suit should have been brought in the corporate name or title of the City of Lancaster.

The above ordinance, it will be observed, is penal in its character, and provides for recovering a penalty. Hence it must be construed strictly, and cannot be so extended as to give authority in the absence of express words to the plaintiff or peace officer, as in this case, to sue in his own name. Coke for use of Commonwealth v. Jacoby, 2 W. N. C. 391. The Courts have held that a proceeding to recover a fine for the violation of a borough or city ordinance is not a summary proceeding. It is of a civil nature, and is to be conducted according to rules applicable to civil cases. Hence we have said this suit was properly brought in debt for penalty; and where the penalty goes to the city or borough, the corporate name of such city or borough should be used as plaintiff; and where it goes to the person suing, the corporate name of the city or borough for the use of the informer, naming him, must appear as plaintiff. But when the action is *qui tam*, a part of the penalty going to the informer, and a part to the city or borough, the informer must be named as plaintiff, suing for himself as well as for the city or borough. The ordinance above quoted gives all the penalty to the city, and therefore this suit should have been brought as above stated. Kensington v. Glenat, 1 Phila R. 251.

The transcript of the alderman does not set forth the offense and the ordinance violated with sufficient clearness and precision. Every essential ingredient of the offense must be set out by the magistrate. The ordinance, if not *in haec verba*, should be designated by number, section, or date of passage. And although it is stated, as appears on the magistrate's docket, "that the defendant, on Wednesday, May 23d, 1883, did violate Section 11 of the ordinance relating to markets of the City of Lancaster, by purchasing on said Wednesday, being market day, within market hours, marketable provisions for the purpose of reselling the same," it is not stated that the said market so held, was within the limits of the said City of Lancaster. That precision seems necessary, when the suit is brought to recover a penalty under an ordinance. City of Phila. v. Mintzer, 2 Phila. R. 43; City v. Hughes, 4 Phila. R. 148.

This latter omission and others mentioned, and the suit not having been brought in the corporate name of the City of Lancaster, we are of opinion, are matters fatal to these proceedings, and the judgment must be reversed. The principal above stated sustains the first exception filed; and we may add in support of

the fourth exception, that it should appear in the evidence direct, or by evidence raising a strong legal presumption, that defendant not only did purchase marketable provision as stated, but that he bought the same "for the purpose of retailing or reselling the same."

Judgment reversed.

ORPHANS' COURT.

O. C. of Allegheny County

In Re Estate of Henry Meyer, deceased.

Where it appears from the by-laws of a beneficial association that its object was to perpetuate a fund for the relief of the widows and orphans of its members, the words heirs and legal representatives, as used in its by-laws and the certificate of insurance issued by it, are construed to mean children.

The Odd Fellows' Endowment Association issued a certificate of life insurance to J., which provided that the amount which would become due thereon at his death should be paid to his wife E. or her legal representatives. She having died prior to her husband, leaving two children to survive her, and he having remarried and left his second wife to survive him. HELD, that the children were entitled to the fund.

The accountant was also administrator of the estate of the deceased wife of the decedent, who was designated as the beneficiary in a certificate issued by the Odd Fellows' Endowment Association. He receipted to the association for the amount which became due thereon as administrator of both estates, but claimed to have received it as administrator of her estate. The decedent remarried and left his second wife to survive him. The accountant not having charged himself with the amount received on this certificate, she filed exceptions to his account, claiming that he should be charged with it for the purpose of distributing it to her as widow of the decedent.

November 14, 1883. OVER, J. The certificate of membershsp issued by the Odd Fellows' Endowment Association to John Henry Meyer, the decedent, provided for the payment of the amount which would become due thereon to Ernestina Emma Meyer, his wife, or her legal representatives, and *prima facie*, the accountant as his administrator had no right to receive it. It appears from the first article of the by-laws of the association that its object is "the creation and perpetuation of a fund for the relief of the widows and orphans of its members." And the exceptant contends that she represents the class to be primarily benefited, and should be substituted for the beneficiary named in the certificate, and is therefore entitled to the fund, and that the accountant should be charged with it for the purpose of distribution to her. The eighth article of the by-laws provides that upon the decease of a member entitled to benefits the secretary shall forward to the person named in the certificate of membership issued to the deceased, or legal heirs, the amount due by reason of said death. In Hodge's Appeal, 8 W. N. C. 209, the words heirs and legal representatives used in the by-laws of a beneficial association, to designate the beneficiaries, are construed to mean next of kin as ascertained by the intestate laws, and if they be so construed here it is clear that the next of kin of the deceased Mrs. Meyer are entitled to this fund. But if it be so distributed as the decedent survived her and was of her next of kin, under authority of Anderson's Appeal, 85 Pa. St. 202, his administrator would take an equal share with their children, contrary to the object and purpose of the association. Such construction, however, should be given to these words, if possible as would promote its purpose. And as the object was to provide for the relief of orphans of members, as well as widows, it can only be done by construing them to mean children. It seems clear then, having in view the designs of the association, they should be so construed. If this conclusion be correct the certificate then provides for payment first to the wife of the decedent named in it, and in the event of her death, then to her children. He had two children by his first wife who survive the persons designated in the alternative or second class, who are to be benefitted in the event of the death of the person designated in the first. It seems reasonable that substitution of persons not designated in the certificate could only be made upon failure of designated persons representing both classes. And therefore the exceptant, although the widow, cannot be substituted as beneficiary instead of the deceased Mrs. Meyer, and her children as the alternative beneficiaries are entitled to the fund. It appears also to have been the intention of the decedent that they should receive it as had he not so intended, he no doubt would have surrendered the certificate and had a new one issued designating the exceptant as the beneficiary.

The exceptions must, therefore, be dismissed.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, DECEMBER 20. 1883. No 42.

SUPREME COURT.

Zuver v. Clark.

Where one who is involved procures a conveyance of land to be made to his wife, she takes a good title against everybody, except persons intended to be defrauded.

A sheriff's sale on a judgment obtained against the husband after the delivery of the deed would be subject to leins which existed at and before the delivery of the deed.

A fraudulent grantee takes subject to liens, and a purchaser at sheriff's sale takes upon the same terms; that is, gets all that was conveyed to such fraudulent grantee.

Lien creditors are not included among those who may be defrauded by the conveyance of the land.

A creditor who approves or recommends a conveyance to the wife of his debtor, is estopped from denying the validity of such conveyance.

A sale of land without inquisition or waiver thereof is unauthorized and void, and such sale is not confirmed by the distribution of the proceeds amongst the judgment creditors of the debtor.

Where there is a pretended waiver parol testimony is admissible to prove that there was in fact no waiver.

Where a witness is competent to testify as to matters occuring since the death of a party, but not as to matters occuring before death, a general objection to his competency as a witness will be overruled.

Error to the Court of Common Pleas of Lawrence county.

November 12, 1883. TRUNKEY, J.—As against everybody, except persons intended to he defrauded, the deed by McCready to Nancy Zuver vested a good title in her for the land in controversy. Joseph Zuver was as completely divested of title as if the conveyance had been made to his wife in good faith for a full consideration in money; and if void as to creditors, yet the title was changed and a sheriff's sale upon a judgment obtained against Joseph Zuver after the delivery of the deed, would be subject to liens which existed at and before the date of delivery. A sheriff's deed would pass to the purchaser all that was conveyed to the frauduleut grantee, and as such grantee took subject to liens, if any, the purchaser at sheriff's sale would take upon the same terms. Lien creditors are not included among persons who may be defrauded by the conveyance of land, for they may follow the land irrespective of all changes in the title, honest or dishonest: Byrod's Appeal, 31 Pa. St. 241; Fisher's Appeal, 33 Id. 294. But the deed being void as to the defrauded creditors, as regards them, it is still their debtor's estate which is sold in satisfaction of their debts, and the purchaser obtains the right to contest and avoid the conveyance: Hoffman's Appeal, 44 Pa. St. 95; Jacoby's Appeal, 67 Id. 434. Should a surplus remain after paying the debts it would belong to the grantee, for the grantee's title only fails so far as it stands in the way of the creditors.

At the time Samuel Zuver obtained his judgment Nancy Zuver was the apparent owner of the land. He was the purchaser at sheriff's sale made by virtue of a *fieri facias* issued on his own judgment. Indorsed on the writ is a waiver of inquisition purporting to be signed by Joseph and Nancy Zuver. It may be conceeded that *prima facie* the waiver is genuine, having been taken by the officer and returned with his writ. The defendant objected that the waiver was a forgery but the court ruled that she could not set up the want of inquisition, and overruled her offer to prove the forgery and that there had been no waiver of inquisition. That was error. Whether the grantor, or the grantee, in the alleged fraudulent conveyance is the party who can legally waive inquisition, is a question not raised at present; the cause was tried as if the defendant had no right to object to the plaintiff's title.

It has already been seen that the right to contest Nancy Zuver's title and possession can only exist in a creditor or purchaser at sheriff's sale. If that sale was void the purchaser was without footing to make the contest. A creditor cannot oust her, or contest her right, save by due legal proceeding. Were he to intrude into possession he could not defend on the ground that her deed is void, or voidable. He must obtain judgment and pursue the proper legal means for collection of his debt, and then a fraudulent deed shall not block his way; but he is not able to thrust

the deed aside until he meets it with vailid process, or with the title founded on a valid judicial sale of the property.

A sale of land under a *fieri facias* without inquisition, or waiver thereof, is unauthorized and void. A void sale is not confirmed by a distribution of its proceeds amongst the judgment creditors of the debtor: Gardner v. Lisk, 51 Pa. St. 506; St. Bartholomew's Church *v.* Wood, 61 Id. 96. Nothing can be added to the opinions in these cases in support of the points decided, nor need the other cases of like import be cited. In St. Bartholomew's Church *v.* Wood there was a pretended waiver of inquisition, but it was held that testimony was admissible to show that in fact there had been no waiver.

The third specification of error cannot be sustained. As printed in the paper book the objection to the witness, George E. Zuver, materially differs from the bill of exception which shows that the objection was to his competency to testify. He was competent with respect to matters that had occured after the death of his father, and if incompetent to prove events prior to said death, the objection should have been pointed to that period.

The defendant's first and second points should have been affirmed without the added qualification. If Samuel Zuver's debt was paid, or a satisfactory arrangement made with him for its payment; or if he approved and recommended the conveyance of the property to Nancy Zuver, he was not a person intended to be defrauded, and the conveyance was valid as against him. If the conveyance was void as to other creditors, and not as to himself, that fact could in no way work to his advantage. As well might Joseph Zuver have attempted to avoid the conveyance as one of his creditors who advised and approved the making of it. None but a person intended by the parties to the conveyance, to be hindered, delayed or defrauded, or one holding under such person; for instance, a purchaser at judicial sale, in the collection of a debt due such person, can avoid the conveyance; for only as against such person or persons is the deed void under the statute of fraudulent conveyances.

Judgment reversed and *venire facias de novo* awarded.*

QUARTER SESSIONS.

Q. S. of Perry County.

Commonwealth v. Rhoads.

Charge of the Court on indictment for riot and riotous assembly against the above named defendant and six others.

November Sessions, 1883. BARNETT, P. J.—*Gentlemen of the Jury:* The defendants in this case are charged in an indictment containing three counts, first with the offence of riot, in the second count with being guilty of a riotous assembly, and in the third with riotous destruction of a private dwelling.

Blackstone defines an unlawful assembly to be "when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game there in—and part without doing it, or making any motion towards it." A riot (as defined by him) is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel; as if they beat a man; or hunt and kill game in another's park, chase, warren or liberty; or do any other unlawful act with force and violence; or do a lawful act, as removing a nuisance in a violent and tumultuous manner. Violence is defined by Webster to be "physical force, strength of action or motion." Bouvier's Law Dictionary says it is "the abuse of force," that force which is employed against common rights, against the laws, and against public liberty. Holt, C. J., in delivering the opinion of the court in a certain case,

*See Neiderhofer v. Bange, 1 YORK LEGAL RECORD 38, where the Court set aside a Sheriff's sale of property which had been conveyed like the above, on petition of the purchaser.

said that the books are obscure in the definition of riots, and that he took it that it is not necessary to say they assembled for that purpose, but there must be an unlawful assembly; and as to what act will make a riot or trespass, such an act as will make a trespass will make a riot; as if a number of men assemble with arms, *in terrorem populi*, though no act is done; so if three come out of an alehouse and go armed. (Tomlin's Law Dictionary, see Riot.) "Wherever there is a pre-determined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous. Thus, although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and therefore to applaud or hiss any piece which is represented, or any person who exhibits on the stage, yet where a number of persons, having come to a theatre with a pre-determined purpose of interrupting the performance, so as to render the actors entirely inaudible, though without offering any injury to the house, it was held that they were guilty of a riot." Clifford v. Brandon, 2 Camp. 268. "It is a riot if a number of people assemble in a town, in the dead of night, and, by noise or otherwise, disturb peaceful citizens."—Penna. v. Criffs et al., Addison's Reports, 277. Time, place and circumstances are not without influence in characterizing human action. The ringing of church bells in the years that are gone was considered, if not absolutely necessary, at least altogether lawful. But now in densely populated places and when clocks and watches are found in every habitation, the same thing under certain circumstances has been declared a nuisance and restrained by injunction. Certain conduct might be considered riotous in a church which would not be so in a bar-room; on the sabbath, which is not such on a secular day; and under our present civilization which would not so have been considered in ages past and gone. The evidence on both sides in this case shows that the defendants, or some of them, in the latter part of July last or beginning of the following August, went to the cabin of the prosecutor in this county, and, with ratchet boxes, bells, horn and discordant noises, engaged in what they call a serenade. It does not appear that they did any injury to the cabin, then forming the residence of the prosecutor, and therefore we think there should be no conviction under the third count of the indictment. But we think the evidence is sufficient, if believed by the jury, to constitute the offence charged in the first and second counts of the indictment.

In order to operate the boxes produced in evidence, the bells and the horns that produced the noises heard a mile away from the scene of action, such violence was necessarily employed as was sufficient to constitute an element in the crime of riot: and the acts so performed we think must now be held unlawful.

It is the duty of the Courts so to administer the laws as to preserve the public peace. And however serenades may have heretofore been regarded in the community, we think it is the duty of the Courts to so declare to law to be, that that which is now calculated to disturb the public peace is contrary to law. If we are not mistaken, serenades of this kind have been resisted in several instances by the parties serenaded to the extent even of the use of fire arms, and it certainly depends very much upon the personal characteristics, good nature and forbearance of the parties serenaded, that they are not forcibly resisted in every instance. *Tempora mutantur et non mutamur in illis*, is the expression of a fact, which challanges recognition. That which is now calculated to disturb peaceful citizens and incite to active resistance must be declared to be unlawful; and serenades of this kind are characterized by that sort of violence that constitutes the offence, if perpetrated by three or

more, which is riotous in all its incidents.

All present at a riot are *prima facie* of the number of rioters. But owing to the curiosity implanted in our nature, which attracts spectators to public demonstrations, the presumption of guilt may be rebutted by actual proof that the spectators were not active participants in the scenes they were witnessing. And if any of the defendants in this case were merely spectators, who were not of the number who originally met for the purpose of effecting this serenade, then, upon evidence that they did not actually assist in producing the discordant sounds and annoying noises, they should be acquitted. But if all assembled at the place of serenade had previously met, and came there in company, they might all be convicted. You may find certain of the defendants guilty in manner and form as they stand indicted in the first and second counts of the indictment, and as to the rest of the defendants not guilty, if you think such verdict justified by the evidence. Now, finally, we say to you that so called calathumpian serenades, performed with instruments, creating hideous noises, are riotous within the meaning of the law, and we submit it to you under all the evidence in this case, to say whether the defendants in this case or any of them are guilty of such offence.

COMMON PLEAS.

C. P. of Luzurne County.

Brown v. Peters.

Where a lease has the name of A. as lessee in the body of the paper, and is signed by A. and also by B. with the wore "bail" added to his name, it is a joint undertaking by both.

As between themselves they are principal and surety; in favor of the lessor they are both principals.

Rule for a new trial.

October 29, 1883. RICE, P. J.—In the body of the lease, upon which this action was brought, only the names of James S. Brown, as lessor, and Benjamin F. Warner, a lessee, appear, but it is signed and sealed not only by them, but also by Owen A. Peters, in front of whose name appears the word "bail." We charged the jury that the defendant could not be held as a joint lessee, nor as a surety or guarantor, and left it to them to say whether the defendant had collected the rent from Warner and had not paid it over, as testified by the plaintiff.

A more careful examination of the authorities, which were not cited to us upon the trial, has satisfied us that in charging as to the defendant's liability upon the written instrument we erred. The case of Fidler v. Hershey, 9 Nor. 363, seems to be in point. That was an action to recover rent. In the body of the lease the name of Householder alone appeared, but Spangler and Fidler signed as securities. The action was defended by Fidler alone, and upon writ of error taken by him the court said: "the evidence tended to show, and the jury found, that there was a lease signed by Householder, Spangler and Fidler his sureties, and though Hershey" (the lessor) "had knowledge of that relation, they were jointly liable to him." The case of Kleckner v. Klapp, 2 W. & S. 44, is still more to the point. It was an action to recover rent. In the body of the lease Kleckner and Charles are named as lessor and lessee respectively. It was signed by them, and also by Klapp, who added to his signature the word "surety." The court, in holding that he was liable, said: "This is exactly the case of Croddock v. Armor, in which such a marginal annexation to the name of one of the parties was not allowed to change his character of promissor to that of guarantor." In the case of Klapp v. Kleckner, 3 W. & S. 519, the instrument was held to be a joint and several obligation. In the case of Croddock v. Armor, 18 W. 258, the surety annexed to his signature to the note in suit the words, "security for the fulfillment of the above." The court said: "They are not technically words in a contract of guarantee, and the juxtaposition of the signature, as well as the absence of apt words, to indicate a contingent responsibility, shows that the parties intended to be jointly bound." See, also, upon the question raised as to the statute of frauds, Pain v. Stackhouse, 2 Wr. 302-306. These authorities clearly show that there was error in our instructions upon this point We are not satisfied that there was any mistake in our instructions as to the repairs made by the defendant.

The rule is made absolute.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, DECEMBER 27, 1883. No 43.

SUPREME COURT.

Logue's Appeal.

Where a purchaser of realty at sheriff's sale being unable to pay the amount of the bid, borrows the amount from another, and the sheriff's deed is made to that other under an agreement that the said conveyance shall stand as security for said loan with interest, such conveyance is in law a mortgage, and equity will decree a re-conveyance to the borrower on payment of the loan.

Appeal from the decree of the Court of Common Pleas of Clarion county.

October 22, 1883. STERRETT, J.

In considering and weighing the evidence and in drawing his conclusions therefrom, the learned master appears to have proceeded on substantially correct principles, and an examination of the evidence satisfies us that it was quite sufficient, both in kind and degree, to warrant his conclusions of fact and justify the court below in sustaining them. As to the averments of the bill which constitute the equity of plaintiff's case, he introduced testimony that was clear, distinct and positive. The testimony of Mr. Slattery, as well as that of the plaintiff himself, was clearly of that character. In addition thereto, they were fully sustained by the corroborating evidence of several witnesses, as to material allegations of the bill. If this testimony was believed, the sufficiency of the evidence, in a legal point of view, to convert a deed, absolute on its face, into a mortgage, cannot be doubted. It was clear, precise and indubitable. It is true there was conflicting testimony as to all the essential features of the case, but the proper functions of a master, in such cases, is to consider the testimony, pass upon the credulity of the witnesses, and thus determine the facts. If the existence of conflicting testimony, introduced perhaps by guilty parties for the very purpose of shielding themselves, were always sufficient to render the evidence, as a whole, doubtful or uncertain, few fraudulent transactions would be exposed or thwarted. When properly ascertained in the duly appointed way, the facts must be accepted as true. It has long been the settled practice of the court not to disturb the findings of an auditor or master which have been approved by the court, especially when they are based on oral testimony, except in cases of plain mistake, affirmatively shown or apparent on the face of the record. In this case nothing of the kind appears in any form, and hence it follows that the several specifications of error relating to the master's conclusions of fact and the action of the court upon exceptions thereto, are not sustained.

After an elaborate discussion of the testimony and reference to authorities bearing thereon, the learned master says: "In the light of these authorities, and upon full consideration of all the evidence, without further commenting on the weight, weakness or contradictions therein, on either side, in our judgment it preponderates strongly in favor of plaintiff, and establishes to our satisfaction beyond a reasonable doubt the complaint set up in this bill. We therefore find the facts stated in plaintiff's bills to be substantially true and correct, and content myself by this reference thereto without extending this report by repeating them here."

The substance of the controlling facts thus established is, that at a sheriff's sale, in August, 1879, of the respective interests of Eli Logue and Reuben Logue in a certain tract of land, the appellee was a bidder and became the purchaser of said interests for the aggregate sum of $6,110; that shortly afterwards appellant agreed to loan appellee the money with which to pay his bid, and it was then agreed, by and between them, that as security for the loan the sheriff's deeds for the property so purchased by the appellee should be made directly to appellant, to be by him held, as a mortgage, until the money loaned with interest thereon was repaid, and accordingly the sheriff's deeds for

the property were executed, acknowledged and delivered to appellant; that soon thereafter appellant fraudulently repudiated said agreement and claimed to hold the legal title to the land absolutely in his own right, free and clear of any interest of appellee therein; that, in October, 1879, appellee tendered appellant the full amount of the loan and interest thereon, which the latter refused to accept. The master also finds that since the filing of the bill appellant was regularly put in possession of the land and then held the same under the sheriff's deeds above mentioned.

The question then is, whether upon the facts thus established the appellee was entitled to a decree declaring the sheriff's deeds to be in fact mortgages, and ordering appellant, upon payment of the money secured thereby, to convey the legal title to the land therein described to the appellee. In some of its features the transaction differs from the familiar case of an absolute conveyance of land by the holder of the legal title, as security merely, and so intended by the parties thereto; but in principle it is the same. Equity regards the substance rather than the form of a transaction. By his purchase at the sheriff's sales appellee acquired an inceptive title to the land in question, which by payment of purchase money and delivery of deeds would have ripened into a complete legal title. He had such an interest as would have been bound by the lien of a judgment entered between the date of sale and the acknowledgment and delivery of the sheriff's deed. But, instead of taking the deeds in his own name and then mortgaging the land to secure the loan made by appellant, it was suggested by the latter that the deed should be made directly to him as security for the loan. This was agreed to and the arrangement was carried out. The manifest purpose of this was not to vest the title absolutely in appellant, but to enable appellee to raise money to pay his bid by pledging the land as security for its repayment. Appellant's subsequent repudiation of the agreement, under which the deeds were made to him directly, and his attempt to use the deeds for a purpose that was never intended when he obtained them, is a palpable fraud against which equity, under the facts and circumstances found by the master, will undoubtedly afford relief.

The decree of the court below declaring that the sheriff's deeds be taken and held to be mortgages, given to appellant to secure the payment of the $6,110 loan, made by him to appellee on August 13rd, 1879, and enjoining appellant from conveying or encumbering the premises, etc., is correct as far as it goes, but it does not go quite far enough. It should also provide that upon repayment of the loan, or so much thereof as remains unpaid, within a reasonable time, appellant shall convey the land in fee to appellee, by deed with covenant of special warranty against all acts done or suffered by himself. This decree may be enforced by attachments, or a master may be appointed by the court for the purpose of making the conveyance. It appears that since the decree was entered the case has been sent to a master for the purpose of stating an account between the parties and ascertaining the balance due by appellee to appellant. The sum to be paid by appellee to entitle him to a conveyance of the land will thus be ascertained and the decree can then be carried into effect by the court below.

Decree affirmed and appeal dismissed at the costs of appellant.

Patterson's Appeal.

Trustees—Discretion of—Commission of.

When a trustee expends, judiciously and for the permanent improvement of the trust estate, a larger sum of money than was originally contemplated, under an order of court authorizing such improvement, he will not be surcharged with the sum so expended.

A trustee acting in good faith is entitled to a commission on money borrowed and expended in the improvement of the trust estate, even though his account is so kept as to require testimony in explanation and a restatement thereof by the court, but the costs incident to such restatement are chargeable to accountant.

Where a cestui que trust furnishes money to aid in payment of improvements, in excess of the amount provided for by order of court, he is estopped from denying the right of the trustee to make such additional expenditures.

Appeal from the decree of the Orphans' Court of Allegheny county.

T. H. Baird Patterson, Esq., trustee, was authorized and empowered to borrow $64,000 for the improvement of certain real estate at corner of Penn avenue and Sixth street, Pittsburgh. The money was borrowed and so expended, but was insufficient to pay for the improvements. One of the parties interested in the estate advanced a large sum of money to assist in payment of the extra cost, and subsequently filed exceptions to the trustee's account.

The following extracts from the opinion of OVER, J., contain a brief but comprehensive statement of the facts and of the law applicable to such cases.

"It appears from the evidence in this case that the trustee, T. H. Baird Patterson, has expended in erecting the buildings on the trust property, and fitting them up for tenants, the sum of $71,008.74, and in payment of taxes and insurance on the property, interest on the mortgage, and other incidental expenses, the sum of $14,026.93, making a total expenditure of $85,035.67. It cannot be questioned that this sum has been very judiciously expended, and that the result has been to largely enhance the rental and permanent value of the property.

"It is objected, however, to allowing the trustee credit for all these expenditures, that he was limited by the decree of court appointing him, to an expenditure of not more than $64,000.

"The cost of the building in excess of the $64,000 has been paid by the trustee, twenty-five hundred dollars of it with money furnished by the exceptant, and the balance out of the rents collected by him. The contingent interests are certainly not injured by having a better building erected, without additional encumbrance on them, than was originally contemplated. And the objection to this expenditure, so far as they are concerned, is without merit As the exceptant voluntarily furnished of his own money twenty-five hundred dollars towards paying this additional cost, he is estopped from denying the trustee right to expend that sum. The only cause of complaint, then, which he could possibly have is that the rents were appropriated to its payment. The evidence shows that he was frequently consulted by the trustee in regard to the building, the different contracts, the changes made therein and the improvements demanded by the tenants, and consented to the same. That he was at the building almost daily, and knew that it would cost more than originally contemplated, and made no objections. Now, that the additional cost had been incurred, and he largely benefitted thereby, he is certainly estopped from denying the right of the trustee to appropriate the rents to its payment.

There is no doubt from the evidence that the trustee gave the greatest care and attention to this building, and the amount claimed by him for his services, five *per centum* on the amount expended by him seems reasonable, and is therefore allowed him.

"The property upon which the building was erected consists of four adjoining lots of ground, each of which was devised by the will of Joseph Patterson, deceased, to one of his four children for life with remainder over.

"The contracts for the construction covered the whole of the building on this property as well as a building on a leasehold adjoining, which the devisees for life were having erected under an arrangement with the trustee, Mr. Patterson. The cost of the building on each lot was not equal, and to adjust it properly it was necessary to estimate the amount of work done on each. As the contracts were finished the trustee should have had the cost of the work apportioned, and should have filed such apportionment

with his account. He failed to do this, and considerable of the time taken in the hearing of this case has been consumed in endeavoring to arrive at a proper apportionment of the cost of the building. He also intermingled in the account filed receipts and disbursements made on account of the building erected on the leasehold, of which this court has no jurisdiction, making it necessary to restate the account. For these reasons the costs must be imposed upon him."

November 5, 1883. MERCUR, C. J. This decree is so definitive in form, as well as in law, that we must refuse to quash the appeal. Nevertheless we think that a party dissatisfied with the finding of facts or of the law by the auditing judge should file exceptions thereto, and have them considered and decided by the Orphans' Court, before the final decree is made. Justice to the important interests passed upon by that court requires this. If the decree be brought here for review we are entitled to all the aid to be derived from the last consideration of the case.

A careful examination of the evidence and of the finding fails to convince us that there is any error in the decree. That the account was irregularly kept and at first improperly presented is unquestioned; but it is restated and corrected, and all the costs resulting from its improper presentation were imposed on the accountant.

In expending a greater sum in the erection of the building than was at first authorized by the order of court, the appellee ran the risk of not having his increased expenditure meet the approval of the court. It was, however, approved, and we think justly. The money appears to have been judiciously expended, and much of the work was done on consultation with the appellant and under his immediate observation. It would now be inequitable to disturb the decree.

Decree affirmed and appeal dismissed at the costs of the appellant.

COMMON PLEAS.

C. P. of Delaware Co.

Esrey v. Gray.

Practice—Pleadings—Inconsistent Rules.

A rule to plead and a rule to arbitrate are inconsistent and cannot be entered at the same time.

Sur rule to strike off a rule to plead.

The plaintiff in this case entered a rule to arbitrate and a rule to plead at the same time, upon which the defendant took this rule.

December 3, 1883. CLAYTON, P. J.

The plaintiff, entered a rule of reference and rule to plead at the same time. The defendant has moved to strike off the latter rule as inconsistent with the former one.

The effect of the rule of reference is to take the case away from the common law mode of trial, and to submit all matters at variance between the parties, without further pleading, to the arbitrament of referees to be chosen by the parties. While the jurisdiction of the court is not perfectly taken away until the arbitrators are chosen, the effect of the rule is to give notice that the case is to take that course. Having elected to pursue the statutory mode of trial, the plaintiff cannot have two strings to his bow and follow both modes at one and the same time. The inconsistency of the two rules will more clearly appear by reversing the parties. Suppose the defendant, without the rule to plead, were to do so, and to file a plea requiring a replication; could he rule the plaintiff to take judgment? Pleadings are often very long and intricate, running through several months; subject to demurrers, and rules to strike off, alter and amend. If the case could proceed under the rule of reference, and at the same time go on in the common law form, until the arbitrators are chosen, there is no good reason why it could not go on afterwards until finally settled by award or appeal. The entry of the rule of reference is a stop to all further proceedings. The two rules are, therefore, inconsistent. They cannot be both in force at the same time, and as the defendant has elected to have the rule to plead stricken off, the rule for that purpose must be made absolute.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JANUARY 3, 1884. No 44.

SUPREME COURT.

Sanderson v. Pennsylvania Coal Company.

Plaintiff brought suit for damages sustained by the pollution of a stream of water flowing through her property. HELD,. That it was error for the Court below to instruct the jury that "the amount of damages are altogether in your discretion."

Error to the Court of Common Pleas of Lackawanna county.

This was an action of trespass on the case by J. G. Sanderson and Eliza McBrair, his wife, in right of said wife, against the Pennsylvania Coal Company.

The facts were as follows:

Eliza McBrair Sanderson was the owner of a valuable lot of land situate in the city of Scranton, Lackawanna county, which she had improved for a residence, at a very large expenditure. One of the chief attractions inducing her to select this place for a residence, was a private stream or water-course of pure water running on the surface through this land. And a considerable amount of the expenditure above mentioned was applied in making the water of this stream useful and convenient for domestic purposes in her dwelling house and its appurtenances. Shortly after the plaintiff had completed the said arrangements, the defendants, who are the owners of lands further up the stream, established one of their collieries a couple of miles above the said land of plaintiff, and so opened and managed the working of their mine, as to discharge their mine water into this stream. Instead of attempting to prevent such discharge, they, on the contrary, for their own convenience, dug a ditch or channel of nearly half a mile in length, to carry the mine water from the point where it is pumped out of the shaft directly down into this stream. By reason thereof the water was so corrupted that the plaintiff was compelled to give up the use of it entirely, and have water brought at a considerable expense from another source to her house and grounds. Failing to obtain any compensation from defendants for the injury thus done her, she finally brought the present action on the case.

The cause was first tried in 1878, and the court below then awarded a compulsory nonsuit, on the ground that this was *damnum absque injuria*, the discharge of the mine water being necessary in mining. This judgment was reversed by the Supreme Court and a *venire de novo* awarded. The case is reported in 86 Pa. St., 401. Upon the second trial in the court below, the defendants set up the same defense as before, and upon judgment being entered against them took a writ of error and brought the case again before the Supreme Court for the purpose of having the former decision reconsidered. The judgment was, however, affirmed.

Verdict and judgment for plaintiffs for $250. Plaintiffs took this writ.

April 16, 1883. TRUNKEY, J.—The controlling principles in this case respecting the plaintiff's right to recover, if injury was caused to her by the defendant polluting the waters of Meadow creek with water from its colliery, were stated in an exhausitive opinion by the late Justice Woodward (86 Pa. St., 401.) Upon the second hearing there was quite as little recognition of a right in the owner of a colliery to materially injure the property of another by fouling a stream with mine water, as upon the first: 94 Pa. St., 302. Now the question is, whether the plaintiff is entitled to compensation for the direct and immediate loss resulting from the injury.

In affirming the plaintiff's point the court ruled that if the defendant polluted the waters of Meadow brook, thereby causing an injury to the plaintiff, she is entitled to recover damages, that the measure of damages is compensation for the injury resulting from the defendant's acts, and that the verdict should be for a

sum that will compensate the plaintiff for the actual loss she suffered, caused by the defendant, previous to bringing the action. That was in accord with the general rule in actions of *tort*, where the injury was unintentional and unaccompanied with malice; but, though sound, it was frittered away by other instructions.

Near the end of the charge the court said: "Now you have it in your power, after you have examined all the evidence in this case, to say what damage the plaintiff is entitled to recover. The amount of damages are altogether in your discretion; what damages you may award the plaintiff is purely for you. You may, in your discretion, say that she is entitled to nothing more than nominal damages, which would be nothing more than six cents; you may say that she is entitled to $500; you may say she is entitled to $1,000; you may go as high as the amount named in the evidence, if you believe that is the plaintiff's actual damage. After ascertaining whether the flow of water in this stream is a benefit to her or not. If you find it is not a benefit and that she ought to recover, then, of course, you will give to the plaintiff damages to that amount, if you please." All that was error. It gave the jury full liberty to give damages in their discretion; to do as they pleased. To exercise the power to find nominal damages, or a fraction of what was used, was against law; their duty, under their oaths, was to determine from the evidence what sum would be a full compensation for the loss suffered by the plaintiff from the defendant's fouling of the waters of Meadow brook and they had no lawful power to find damages for less. They were bound to "go as high as the amount named in the evidence;" if they believed she suffered so much damage. It was no matter of discretion, but a sum to be determined from the evidence that would compensate the loss, as clearly so as if the plaintiff's house had been destroyed and the jury were to find its value from the testimony in the cause. Even if deduction could be made for benefits, the value of the loss should first be found.

There was no allegation of injury from overflow, or for swelling the waters of the stream; but the plaintiff complained that the defendant had made the water unfit for the uses she had enjoyed. "Though fouled there is more of it," is not a good answer. A large stream of impure and unwholsome water may be of greater market value than a small one that is pure and wholesome; and if the benefits of a large and constant flow of unwholsome water, which spoils a small pure stream for the uses of a dwelling house, can be offset against the owner's claim for the injury, he is without remedy. His property can be taken or injured against his will, with impunity, for private use. This is not the law. He may hold and enjoy his property so long as he chooses, except when taken, injured or destroyed, for the use of the public. A man has no right to turn a stream out of its natural channel into another stream, thereby increasing the flow of the latter through another man's land, and though no appreciable damage could be proved, an action would lie. If it be conceded that the turning of water from a colliery into a stream is an exceptional case, for which an action will not lie where it has done no injury in fact; yet if it has fouled the stream the injured party is entitled to redress. The plaintiff avers that the defendant has subjected her to conditions that did not exist when she built the dams, laid pipes, improved her property, and began to use the water of the stream, not by increasing the quantity, but by spoiling the water for her uses. "There is no set-off, or recoupment of damages, not founded on the undertaking or default of the party sought to be subjected to such adjustment, nor can he who has inflicted a wrong require the in-

jured party to accept indemnity in any other way than such as the law provides:" *Gerrish vs. New Market Manufacturing Co.*, 10 Fost. (N. H.), 478. No infringement on the rights of another can be justified on the ground that the act is a benefit to the owner, if it is done against his will: *Tillotson vs. Smith*, 32 N. H. 90. Benefit to a meadow below a dam by a ditch, dug at the time of the erection of the dam by the owner of the dam, through his own land, cannot be set off against damage to the meadow by subsequent overflowing occasioned by the dam, and the cost of the ditch is immaterial in assessing such damages: *Giles vs. Stevens*, 13 Gray, 146.

A few cases may be found that are in seeming conflict with the rule that in the matter of nuisance there is no set-off or recoupment, but none in Pennsylvania. Where a case arises of permanent injury, where the measure of damages is the difference in value of the land as affected by the nuisance and what it would be worth if unaffected, in some sense it may be that benefits are properly considered; but the real question is, what is the amount of loss? Here the court, upon the defendant's objection, properly overruled the plaintiff's offer to prove "what was the permanent injury and damage to the property itself, that is the freehold, in the loss of value caused by the destruction of this water?" Is it not apparent that the destruction is permanent. The defendant may abate the nuisance.

We are also of the opinion that it was error to affirm the defendant's tenth point: "All that the plaintiff in this case can claim, if anything, is the use as a riparian owner of the water in its natural state, and she cannot claim for the loss of or damages to any artificial construction put up by her for the use of the water from this stream, nor for the cost of introducing other water for such artificial purposes." If, before the defendant spoiled the water, the plaintiff had erected proper constructions for its convenient use, and the defendant injured or rendered them useless, the plaintiff is entitled to compensation. What rule limits the damages to the value of the water in its channel exclusive of all improvements for its convenient and reasonable use? As well might a court and jury in case of diverting the waters of a creek from a valuable mill property, and consequent destruction of its use as a mill, limit the owner's damages to the value of the mill site in its natural state, exclusive of loss for injury to and uselessness of the dam, building, machinery and other improvements. The point and its answer limited the plaintiff's damages to the water in the channel, with instructions to deduct the amount of benefit, and the ninth assignment must be sustained.

Testimony was received to show that the mining of coal in the anthracite region is below water level; that water is encountered wherever coal is mined in that region, and that what was done by the defendant in working its mines and pumping water therefrom was in the ordinary, reasonable and proper mode of working its mines, "for the purpose of mitigating damage in this case." It was offered also for other purposes, for which it was rightly rejected. It should not have been received at all, for it was irrelevant lumber. This was a first suit for an alleged nuisance, and the unmistakable points raised in the proceedings were the plaintiff's right of recovery, if she was actually injured by the mine water, and the amount of merely compensatory damages. Where the measure of damages is compensation only for the loss by the injury, it is difficult to conceive how the mode of working a mine below the water level would be a proper thing to consider in ascertaining the amount.

C. P. of Delaware Co.

COMMON PLEAS.

Hinkson v. Fairlamb.

Mechanic's Lien—Can surety on contractor's bond file a lien?

One who has joined, as surety, in a contractor's bond conditioned that no lien shall be filed against the building cannot subsequently acquire a lien as a sub-contractor.

Sur rule for judgment for want of a sufficient affidavit of defence.

The facts are fully set forth in the opinion of the court below.

J. B. Hinkson, for rule.

The affidavit of defense does not allege that there is nothing due the plaintiff.

The defendant's claim is joint, against the plaintiff *and another*, and cannot be set off against this lien. It is in the nature of an equitable set-off, which is never allowed between different parties or for different causes.

The claims are not in the same light.

Set-off will not be allowed when it will work harm to the parties.

See Jackson vs. Clymer, 7 Wr. 79.
McDowell vs. Tyson, 14 S. & R. 300.
Singerly vs. Swain's Adm'rs, 9 C. 102.

Wm. Ward, contra, cited

Given vs. Bethlehem Church, 11 W. N. C. 371.
Lug vs. Caffrey, 12 N. 52.

Dec. 3, 1883. THE COURT: The proceeding is a sci. fa. upon a mechanic's claim. The defence is that the building was erected under a written contract for a round sum, which has been fully paid to the contractor; that the plaintiff's claim is for material furnished the contractor under the written contract; and that the plaintiff, together with another, were surties for the contract to the owner, (the defendant) for the faithful performance of said contract on the part of the contractor. Said contract among other things stipulated as follows: "The said John W. Barnes hereby agrees to deliver said building all complete within the specified time of three months and *free from all claims of mechanics or material men.*" The case of Given vs. Bethlehem Church 11 W. N., 371, is in point. One who is surety for the contractor in an agreement which stipulates that no liens shall be filed against the building, cannot subsequently acquire a lien. The reason is too clear for argument. If this claim could be recovered against the owner, he could at once sue the plaintiff and his co-surety on their agreement of suretyship, which would be an unnecessary circuity of action, and a useless expenditure of time and costs. It is not necessary now to decide whether an independent agreement between the owner and contractor for extra work would alter the case. If there was such an agreement, and the materials for which this claim is filed were furnish- for such extra work, it may be that the lien can be sustained, but this is not alleged in the claims filed, and the affidavit of defence positively avers that the materials named in the claim filed were furnished materials comprised in said written contract. The affidavit is therefore sufficient.

Rule discharged.

C. P. of Philadelphia Co.

City vs. McManes.

A subpœna duces tecum served on a witness requiring him to produce certain books or papers in his custody and control is complied with by their being brought into court at the time specified.

December 29, 1883. BIDDLE, J.—A subpœna *duces tecum* served on a witness requiring him to produce certain books and papers in his custody and control is complied with by their being brought into court at the time specified; whether the party who has issued the subpœna shall be allowed to examine them is an entirely different matter. The issuing of the subpœna is, of course; the permission to examine requires the judgment of the court. If the law were otherwise, it would be in the power of either of the suitors to examine the private papers or books of any individual or firm whom they might choose to bring into court. The eighth section of the Bill of Rights provides "that all people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizure; and that no warrant to search any place, or to seize any person or things, shall issue, without describing them as nearly as may be, not without probable cause, supported by oath or affirmation. If without oath or affirmation, and by merely issuing a subpœna, papers can be seized, the Constitution would clearly be violated. Books and papers of the parties to the suit, under the Act of 1798, cannot even be ordered by the Court to be produced, except on motion and good and sufficient cause shown by affidavit and due notice, and then only when they contain evidence pertinent to the issue. So that in no case, until the Court is satisfied that the books contain matters relevant to the suit, will the party who has issued the subpœna be permitted to examine them. Whether the books called for by the subpœna have been brought into Court is a question for the Court to investigate, and not for the party who issued it to determine. The question is, whether the process, issued by permission of the Court, has been obeyed. Of this the Court will satisfy itself in the mode it deems proper. In the present case the Examiner will report to us what books were called for by the subpœna, and what books have been produced before him, we will then decide whether the witness has rendered himself liable to be attached.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JANUARY 10, 1884. No 45.

COMMON PLEAS.

Cole v. Schall.

Master & Stewart—Negligence—Duty of employer.

Plaintiff was employed in defendant's shops, where the machinery was driven by a small engine fed by a pipe from the large boiler, and unattended by any one. By the breaking of the governor belt of this engine, the shafting was propelled at a high rate of speed, a pulley on this shaft was broken, and the plaintiff struck by one of the fragments, resulting in the breaking of a limb. HELD, That if the jury believed that the defendant did not exercise due care in having an engine thus unattended and the plaintiff was guilty of no contributory negligence, he was entitled to recover.

It is the duty of an employer to use due and reasonable care as to the safety of the appliances and machinery furnished by him. But, on the other hand, where servant accepts employment on defective machinery, either from its construction or want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment.

If plaintiff was placed in a position of peril by the accident which happened to the governor belt of the engine, and the jury believe this occured because of a want of reasonable care on the part of the defendant, the plaintiff could not be held to the exercise of the soundest judgment under such circumstances of peril, and his right to recover would not be defeated because he was injured while trying to save the machinery in his charge.

Motion for new trial.

The facts in this case are set forth in the charge of the Court (WICKES, P.J.) to the jury.

GENTLEMEN OF THE JURY:—The plaintiff Charles T. Cole has brought an action against Michael Schall the defendant to recover damages for injuries sustained by him while in the employment of the defendant. The relation they bore to each other was that of employer and employe, or more properly speaking of master and servant.

There are certain principles of law applicable to the relation, and which I will endeavor to state as correctly and fully as I can, in the brief time I have had to examine the question. You will bear in mind these principles of law, in considering the facts of this case, as in no other way can you arrive at a fair and intelligent verdict.

In the first place it is a fundamental principle of that relation, that the master shall furnish and maintain suitable instrumentalities for the duties required of his servants. He does not, nor is he required to warrant the safety and proper condition of the appliances or machinery furnished, for it is obvious that no degree of care can insure perfect safety, and it would be most unjust to the employer to require it. He is therefore only bound to use due and reasonable care, the degree and nature of which are to be estimated on a consideration of the facts of each particular case.

On the other hand the servant, when he enters into the engagement, accepts all the risks incident to his employment.

If he thinks proper to accept employment on defective machinery, either from its construction or want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment.

Again, says one of the cases, if the instrumentality by which the servant is to perform his duty is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master is not liable for resulting damages; the servant in such case, being guilty of concurring negligence. In other words, as was said by the Supreme Court in a recent case, citing as authority for the doctrine, Wharton on Negligence 206: "In accepting an employment the employe is assumed to have notice of all patent risks incident thereto, of which he is informed, or of which it is his duty to inform himself. When therefore he undertakes hazardous duties he assumes such as are incident to their discharge, from causes open and obvious, the dangerous character of which he has had opportunity to ascertain." (id 214.) These are the general principles to which at this time I call your attention—there may be others to which I shall advert before closing this charge. Let up apply them to the case in hand.

When the plaintiff entered the service

of the defendant, he had a right to believe that the machinery furnished him to do the work alloted to him, was not only suitable for that purpose, but that reasonable care had been taken by his employer, to see that it was safe for the purpose for which it was to be used. This, however, did not absolve the plaintiff from the duty of informing himself of any patent defect in either the construction of the machinery, or in the manner of propelling or using it, and before you can find for the plaintiff you must be satisfied not only that the defendant was guilty of negligence, which in this case would be a want of due and reasonable care, in providing defective machinery and propelling it in a dangerous way, but you must be further satisfied that the defect was not sufficiently obvious to be noticed by plaintiff and was not in fact observed by him. If it was, and he failed to speak of it and chose to continue in the service, he would be guilty of concurring negligence himself and could not recover.

When the plaintiff entered into the employment of the defendant he found the machinery and engines in the condition and position they were on the day of the accident. The pulley wheel had been encased in wood in the manner described by the witnesses, and the small engine which furnished the motive power to the pulley wheel was managed alike at both periods and during the intervening time. No change was made in either. The plaintiff alleges that to furnish a pulley wheel of this character, weakened as is contended by the holes drilled through its face, and the added strain or pressure upon it, caused by its increased size, was in itself an absence of that due and reasonable care on defendant's part, which the law required him to take, and which the plaintiff had a right to suppose had been observed. He further insists that to permit the small engine to be run without the constant presence of an engineer or some one whose duty it was to watch it and stop it, in event of such an accident as the breaking of the governor-belt which controls its motion, was also such negligence as makes him liable under the circumstances of this case. And witnesses have been produced to sustain these positions.

The defendant on the other hand insists, that the pulley wheel was not weakened by the "lining" as it was called, which was applied to it. That on the contrary it was strengthened, certainly if not strengthened, that its original strength was not impaired. And they have produced a number of witnesses to establish this fact. The defendant also contends that it was not indulgence to run the small engine, without an engineer, and without the appliance known as an "automatic stop"—and this position also, they have produced evidence to sustain.

The defendant further takes the position that even assuming the pulley wheel to be dangerous, and the method employed to run the engine also hazardous, that the defect in the one was patent, and that the plaintiff was bound to observe it and did observe it, and that he also knew the fact that no one was detailed whose special duty it was to watch the engine, and that he ought to have known the danger, and knowing and yet continuing in the service, he is guilty of concurring negligence, and cannot recover, and this is a correct statement of the law, if he knew or as a prudent man ought to have known, not only the facts, but the risk resulting from these facts. It is for you to determine the questions at issue in this conflict of evidence regarding the wheel and the engine.

I confess I have not quite appreciated the importance of all this investigation touching the relative strength of the pulley wheel before and after it was bound with this wooden rim. It seems to have been abundantly strong for the purpose it was intended for, so long as the agencies at work were only those contemplated in its use. It was only when the enormous

power of the engine was turned loose by the breaking of the belt, that the wheel was sent with such fearful speed, that it was broken into fragments.

There is nothing in the evidence to show that the strongest pulley wheel would have withstood this tremendous force—certainly nothing to show that it is an absence of due and reasonable care not to build machinery strong enough to resist such power. I can but think, that if the only evidence of negligence consisted in the fact that the pulley wheel broke under such circumstances, that the plaintiff would have a very slender case to submit to you. But how stands the evidence in regard to the engine.

The pulley wheel without the force transmitted to it by this engine was certainly harmless enough—the motive power which propelled it came from the small engine of which you have heard so much during the progress of the cause. This as we have seen, was fed from the boilers in the large shop, and the engineer was stationed in the large shop, at a considerable distance away—he could not see the small engine from where it was his custom to be. Was it negligence—was it a want of reasonable care, on the part of defendant or those to whom he intrusted the management and control of matters of this charcter, to permit the small engine to be thus unattended.

The defendant says not—and he has produced a number of witnesses who so testify. You are not to infer the negligence from the happening of the accident in this case, but was it such a risk as ought to have been guarded against by the exercise of due and reasonable care—or did the defendant in good faith, fairly and reasonably deem it prudent to allow the engine to be run without an engineer to control it. If the former, plaintiff would be entitled to recover—if the latter, the defendant is entitled to your verdict. It is said by defendant, that even assuming the negligence in the management of the engine, it would only be the *remote* cause of the injury, and for which the defendant would not be responsible. Whether it is the proximate or remote cause is a question for the jury to determine under the facts of each particular case.

Said the Supreme Court, in a case in which the same question was presented, "the jury must determine whether the facts constitute a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of defendants. The rule for determining what is proximate cause, is that the injury must be the natural and probable consequence of the negligence, and that it might and ought to have been forseen under the circumstances." It is for you to say, tested by this rule, whether the "running away" as it has been aptly called, of the engine, was the proximate or remote cause of this accident; if *remote* in the legal sense, then the plaintiff could not recover, in this view of the case—but if the proximate cause, and the elements of negligence to which I have before referred are found, then the plaintiff would be entitled to your verdict.

I have omitted one or two matters to which I ought to refer. It has been argued that defendant himself caused this accident, by slipping the band from the tight to the loose pulley of his machine, and thus give additional rein to the engine. But we must not forget that he did this at a time when he was notified of what had happened, to wit, the breaking of the governor belt of the engine, and when others were flying from the shop.—His position was one of peril, and he could not be held to the exercise of sound judgment at such a time. Assuming it to be true, that he might have escaped had he not paused to look after his machine, such an error of judgment at such a time ought not to prevent a recovery, if he is otherwise entitled.

To recapitulate then what I have endeavored to make plain to you, in the hurry incident to the trial, if you shall be of opinion from the evidence that the defendant exercised himself or through his agents, and the presumption of law is that they were competent and careful persons, that due and reasonable care which the law requires in furnishing safe machinery to this plaintiff, and that the engine which propelled it was run with due care to the safety of those employed in the shop or that the defendant in good faith believed it was run with reasonable care, then the plaintiff could not recover.

If on the contrary you find there was negligence on the part of defendant in either or both of these particulars, but that the risks were so obvious, that plaintiff knew them, or ought as a prudent man to have known them, and yet continued in the service, that then he would not be entitled to recover, because his negligence would have concurred with that of defendant, to produce the accident, and a recovery would be thereby barred.

But if you find the negligence of defendant and no concurring negligence on the part of the plaintiff, then your verdict will be for plaintiff—otherwise for the defendant.

If you shall find for plaintiff, then you will assess the damages he has sustained by reason of this accident. And you will remember, that it is the injury to to him, the plaintiff, that you are to compensate —you are not to add one dollar, because you may suppose the defendant is able to pay.

For what then are you to compensate him?

The Supreme Court has given us the measure of damages in cases of this character, and they are such damages as necessarily result from the injury complained of. The plaintiff, if entitled to recover, has a right to be compensated for his actual expenses and loss of time in being healed, for his pain and suffering, bodily and mental, far the inconvenience resulting from the disabled limb, and for any permanent loss of earning power; (13 P. F. S. 299.)

Among the Court's answers to plaintiff's points is the following:

An employer is only bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief.

It is not his duty to know of and provide every appliance known, that adds to the safety and convenience of the use of the machinery provided, he is only held to due and reasonable care in such matters. The question therefore is not what the defendant might have had, but whether it was a want of ordinary care not to have an "automatic stop" on the small engine under the circumstances of this case. And this is a fact for the jury.

Among answers to defendant's points was the following:

Whether the running away of the engine was a proximate or remote cause of the accident, is a question for the jury.

The jury found for the plaintiff. A motion was made for a new trial.

H. Keesey and V. K. Keesey for motion.
Geo. B. Cole, H. H. McClune and W. C. Chapman, contra.

January 12, 1884. WICKES, P. J.—Upon a careful review of this case we are of the opinion that the answers to the points taken in connection with the charge of the Court, which is now filed, contains a correct statement of the law. The question of negligence arising under the disputed facts of the case, was of necessity for the jury—and was, we think, correctly submitted. What plaintiff's counsel said in argument to the jury was objected to at the instant and stopped. We discover no error which entitles the defendant to a new trial, and we therefore over-rule the motion and enter judgment upon the verdict.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JANUARY 17, 1884. No 46.

COMMON PLEAS.

Lee & Bro. v. Byers.

C. P. of Chester County.

Conditional Sale—Bailment—Vendor and Vendee—Execution Creditors.

As a rule, in cases of conditional sale, where possession is given to the purchaser, the right of reclamation, while good as between the parties, cannot be exercised against execution creditors of the vendee or bona fide purchasers from him without notice of the conditional agreement.

A case which was held a conditional sale.

Replevin, No. 12, Jan. Term, 1883.

The facts appear by the opinion of the Court, which was filed August 20, 1883.

FUTHEY, P. J.—This case was an action of replevin. The defendant, Samuel Byers, pleaded non cepit and property in Robert Byers and Francis H. Gheen, and the two latter pleaded non cepit and property in themselves.

The facts of the case, as agreed upon, are briefly these :—

The plaintiffs, manufacturers of agricultural implements, on or about August 1, 1882, placed in the possession of Samuel Byers, on a farm occupied by him, a mowing machine and reaping machine, subject to his approval and option to purchase after trial. Subsequently, on Sept. 9, 1882, Samuel Byers gave to the plaintiffs two promissory notes for the price thereof, which notes were in the following form :

"WEST CHESTER, Sept. 9, 1882."

"On the first day of March, 1883, the subscriber, whose Post Office is Berwyn, County of Chester and State of Pennsylvania, promises to pay to L. H. Lee & Bro., Baltimore, Md., or order, seventy-seven dollars for value received, with interest from August 1, 1882, at five per cent. if paid when due, if not so paid, then interest shall be six per cent. from date, without any relief from valuation, appraisement or exemption laws, payable at the National Bank of Chester County, Pennsylvania. The express conditions of the sale and purchase of the champion new mower and reaper, for which this note is given, is such that the title, ownership, and possession does not pass from the said L. H. Lee & Bro., until this note, with interest, is paid in full; the said L. H. Lee & Bro. have full power to declare this note due and take possession of the said champion new mower and reaper at any time they may deem this note insecure, even before maturity of the same.

"Witness :

"A. A. Hamilton." "Samuel Byers."

On October 28th, 1881, Samuel Byers, being indebted to Francis H. Gheen and to the National Bank of Chester County, executions and attachments were issued by them and these machines, in the possession of Samuel Byers, with other articles of personal property, were levied on. On October 31, 1882, Robert Byers and Francis H. Gheen advanced, for the relief of Samuel Byers, a large sum of money and took from him a bill of sale of the mower and reaper and other articles, in consideration of the money thus advanced, and further proceedings on the execution and attachment were staved.—Robert Byers and Francis H. Gheen then advertised the property, thus purchased, for sale on the 9th of November following, on which day, and before the sale, the mower and reaper were replevied by the plaintiffs. Gheen and Robert Byers, when they advanced their moneys in relief of Samuel Byers and took the bill of sale, had no notice that the plaintiffs had any claim on or to the mower and reaper.

Can the plaintiffs, on this state of facts, maintain their action of replevin? This question, we are of opinion, is settled by the recent cases of Stadtfeld *v.* Huntsman & Co., 10 W. N. C. 216, and Brunswick *v.* Hoover, Ib. 219. These cases discuss the subject so fully, that a further citation of authorities is unnecessary.

The plaintiffs had given Samuel Byers possession of the mower and reaper, with

the option to purchase after trial. He did purchase and gave the notes in question for the purchase moneys, as is expressly stated on the face of the notes. The transaction was not a bailment, but a conditional sale, wherein the property was to remain in the vendor until the goods were paid for with a right to reclaim them if not paid for, or if the vendor deemed the notes taken for the purchase moneys insecure.

In the case of a bailment, the owner or bailor is entitled, as a rule, to the goods as against everybody, but, in a conditional sale such as this, where possession is given to the purchaser, the right of reclamation, while good as between the parties, cannot be exercised against execution creditors of the vendee or bona fide purchasers from him, without notice of the agreement—This case cannot be distinguished from those referred to and comes precisely within the rulings there made. See also Krause *v.* Commonwealth, 9 W. N. C. 61.

The question was raised, on the argument, whether the circumstances attending the sale of the property by Samuel Byers to Gheen and Robert Byers were such as to take from the plaintiffs the right of reclamation as against them. We have no doubt on this point. They were innocent purchasers for value, and the agreement, giving the plaintiffs the right to retake possession of the property, was fraudulent and void as to them. The fact that, when the replevin was issued, they had not actually removed the property from the premises occupied by Samuel Byers, makes no difference. They had parted with their money on the faith of his ownership of the goods and had become the purchasers of it, and, so far as concerns the plaintiffs, removal from the premises was not necessary.

Let judgment be entered in favor of the defendants, Robert Byers and Francis H. Gheen, and that they have return of the goods irreplevisable.

Gantz v. McCracken.

Sale—Change of possessson—Fraud—Lien of Execution.

L., the owner of an artesian well borer, was indebted to M., an employee, and gave him a judgment for the same. Afterwards M. threatened to issue an execution, whereupon L. gave him a second judgment note in payment of the first. Afterwards M. issued execution upon the first judgment, which had not been marked satisfied. After the levy of the property on this execution, L. sold the same to G., another employee, who had knowledge of the execution. The first execution was set aside and a second issued, when G. claimed the property. An issue was formed under the Sheriff's Interpleader's Act, G. being plaintiff and M. defendant. Upon the trial of the case these facts were proven, and also L.'s efforts to sell the property the fact that G. paid no money for it, that L.'s contracts were all completed, and that there seemed to be no apparent change in the appropriation of the proceeds of the work and labor done for parties who engaged the machine. The jury found for the plaintiff. The Court (Gibson, A. L. J.) set the verdict aside, as being against the weight of the evidence.

Rule for new trial.

This is an issue directed by the court under the Sheriff's Interpleader Act, to determine the ownership of certain property levied upon under *fi fa*, No. 40, April Term, 1883. The material facts are these: Samuel M. McCracken held a judgment against James G. Ludwig for $639.00, on which a *fi fa* to August Term, 1882, was issued. The plaintiff stayed the writ at the instance of the defendant, and subsequently took from him a promissory note for $651.00 with warrant of attorney to confess judgment, in payment of the amount due on said judgment, but the judgment remained unsatisfied on the record.

Ludwig having failed to pay the note, McCracken directed his attorney to "collect the money" who, not knowing anything of the note having been taken in payment or substitution of the judgment on record and unsatisfied, issued *alias fi. fa.* to April Term, 1883, under which Ludwig's property, consisting of a portable steam engine and machinery for boring artisan mills, was levied upon. Gantz was an employee of Ludwig, at the time of the levy, working by the day. Ludwig, immediately upon the levy being made, tried to sell the property seized. He failed to get a purchaser for it, owing to the fact that it was in the custody of the Sheriff, as was proven at the trial. He then applied to the Court for a rule to

show cause why the *fi fa* should not be set aside, alleging that it was void.

Pending the rule he sold the property levied upon to Gantz, the plaintiff, in this issue. No money was paid by Gantz, at the time of the alleged sale, but he gave Ludwig his promissory notes for the purchase money. The sale was made Feb. 23, 1883; on the 26th of the same month the rule was made absolute. McCracken entered judgment on the note for $651. On the same day the *alias fi fa* was set aside, and a *fi fa* was issued at once and the same property levied upon. The property was in Hellam township, about eight miles from York. The lien of the *fi fa* attached at 11:10 o'clock A. M., February 26. Gantz went to take possession of the property about 6 o'clock P. M. of the same day. Upon his claim to the property the Sheriff's interpleader intervened.

N. M. Wanner and John Blackford for plaintiff.

James Kell and W. C. Chapman for defendant.

January 12, 1884. GIBSON, A. L. J.—With regard to the material facts of this case there is no conflict of testimony and no question as to the credibility of witnesses. The whole case is before us without dispute except as to the conclusion to be drawn from the facts as proved.

At the time of the transaction between Ludwig and the plaintiff in this issue, on the 23d of February, 1883, which is claimed to be a *bona fide* purchase and change of ownership of the property in question, the process upon which the property was then held was void. The question, therefore, of a fraudulent sale of the property arises just as though the transaction was done in contemplation of an execution against it. But, nevertheless, the property was held on the execution issued on 8th of February, though subsequently set aside on the 26th of the same month.—The property was in *custodia legis*, sufficiently to prevent a transfer by delivery. *Fieri facias*, No. 27, April Term, 1883, was set aside at 10:50 A. M. and *fieri facias*. No. 40 April Term, 1883, was issued on the same day at 11:10 A. M., twenty minutes afterwards. Now the question whether the first execution was a lien or not, or whether there was any lien upon the property at all until the second execution issued at 11:10 A. M., on the 26th of February, does not effect the *bona fides* of the transaction; but the knowledge of this plaintiff of the first levy, which was pending at the time he bought the property as he alleges, on the 23d of February, the stopping of work at the time of the first levy, and the efforts to sell by Ludwig, are facts bearing upon the question of a fraudulent intent in the sale. But in addition to this and the facts and circumstances surrounding the transaction, such as the plaintiff being an employee of Ludwig and being possessed of no money or property whatever, the fact of the working of the machine afterwards by both of them, whether they changed their relations to each other by the master becoming the servant and the servant the master, or whether the contracts for work, were Ludwig's or the plaintiff's, or which of them claimed or had the ostensible possession of the property.—all this conjoint operation of the machine and machinery, constituting the property in question, and the manner of the appropriation of its earnings, adds to the weight of the evidence tending to show a fraudulent transfer of its ownership. And here perhaps there was an inadequate conception of the case by the jury.

If Mr. Ludwig had relinquished all concern whatever in the property, and had gone away from this neighborhood, the *bona fides* of the transaction could still have been questioned from the circumstance immediately surrounding the transaction. But here arises the question as to the weight of evidence. The machinery had been bought by Mr. Ludwig on credit from this defendant, who is plaintiff in the pending execution, and the plaintiff in

this issue has also shown his alleged purchase to have been upon credit, with the exception of a small amount of money due him as employee. Ludwig's contracts as former owner are carried out, his debts are paid, he remains with the machinery, which he worked himself, as he said, "beause he knew better about working the machine than Gantz did." The payments on account of the purchase, as claimed by plaintiff, were from the earnings of the machine. In other words there is no apparent change in the appropriation of the proceeds of the work and labor done for parties, who engaged the machine, from what it would have been had Ludwig remained owner, while the man from whom Ludwig bought, this defendant, is prevented by the arrangement from collecting his claim.

There seems to be no conceivable object, no reason why Mr. Ludwig should have made sale to the plaintiff of this property, or why he should have parted with the possession of it in any way, except for the purpose of preventing Mr. McCracken from making his money out of it. The only question for the jury to determine was whether the plaintiff was cognizant of that intention and abetted him in it.

But apart from the question of the weight of evidence, I think, some confusion found its way into the jury box, arising from the evidence as to possession taken, which can, in my opinion, concern only the question of legal fraud. A question of fact went to the jury along with that of fraudulent transfer, as to whether such possession was taken of the property as the circumstances admitted of. That question apparently arose because the court could not pronounce the want of immediate delivery of possession a legal fraud on account of those circumstances, and hence it was for the jury to say whether there was a sufficient delivery to save it from being a legal fraud. But such an issue of fact has no bearing upon the issue as to actual fraud.

After the transaction at the Pennsylvania House, on the 23d of February, as already stated, the property was not released from the custody of the law until the 26th of February, and twenty minutes after that release another execution of McCracken seized the property. Hence, of course, the plaintiff in this issue could not get possession of the machinery in question, except upon a claim of property and a bond given for its forthcoming to meet the demands of the execution issued by the defendants in this issue. Any effort in order to take possession by Gantz were of course idle till that claim was made and bond given. There is, then, no such question of fact in the case. If it was a *bona fide* sale, the plaintiff is entitled to possession of the property by law as soon as he can get it. The same efforts to get possession, whether real or not, would have been made whether the sale was *bona fide* or not, and cannot have any bearing upon the question of fraudulent intent.

This is an issue directed by the court to determine the ownership of certain property levied upon. It is not an action for the recovery of goods involving merely the question of title. It involves the rights of an execution creditor depending upon the solution of a question of alleged fraud.

Under all the evidence in the case, the court is not satisfied with the verdict and, therefore, the rule for a new trial is made absolute.

Judgment—Married Women.—A judgment confessed by a married woman can be enforced only in the single instance where, when a conveyance is made to her, it forms part of an agreement under which she takes land subject to the condition that she shall pay its price. In every other instance it is void.—*Vandike v. Wills*, 14 Pittsburgh Legal Journal 217.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JANUARY, 24 1884. No 47.

QUARTER SESSIONS.

Com. v. Stokes et. al.

Criminal Law—New Trial—Incompetency of jurors.

On a motion for a new trial, the defendant failed to produce proof that the alleged disqualifications of some of the jurors was unknown to him or his counsel during the trial. HELD, That the motion must be dismissed, because not properly supported by evidence.

N. was a resident at the time his name was put in the jury wheel; he moved to Baltimore, with the intention of remaining if he liked it, if not, to return. He did return, and served as a juror HELD, That he was not disqualified.

M. declared under oath that he understood what the witnesses testified to and what the Court said in the charge to the jury. HELD, To be properly qualified to act as a juror.

The duty of comparing genuine signatures with the alleged forgery, is exclusively for the jury.

Motion for a new trial.

The reasons for the new trial are given in the Court's opinion.

H. W. McCall, W. C. Chapman and H. L. Fisher, for motion.

E. D. Ziegler and Blackford & Stewart, contra.

January 21, 1884, WICKES, P. J.—This defendant was tried and convicted in October, 1882. In January, 1883, we granted a new trial, because it was shown that a witness for the Commonwealth had said while the trial was in progress, to one of the jurors "that he could have told a good deal more about defendant's character, but was afraid."* Fearing the affect of such a statement upon the juror's mind, we gave the defendant another opportunity to have his case passed upon by an impartial jury. Now, after, a second and very protracted trial has been completed, we are asked to make absolute this rule for a new trial, chiefly because of certain disqualifications of two jurors who sat in the case.

It is alleged that I. K. Newcomber was not a qualified elector at the time he was selected, drawn or served.

It is also said that Jacob Myers, another juror, did not understand English sufficiently well to serve.

And we are further asked to submit the question of defendant's guilt to another jury because a number of experts have compared the alleged forged signatures with other signatures admitted to be genuine, and have pronounced in favor of the genuineness of the alleged simulated signature.

It is to be observed in the first place, that an important part of the defendant's proof has been entirely omitted. There is absolutely no evidence before us of which we can take notice, that the defendant and his counsel were ignorant of the alleged disqualifications of jurors, at the time the jury was empanelled or pending the trial. In the first reason filed, the defendant has sworn that nothing was known of Newcomber's disqualifications at that time, but that was necessary to obtain the rule, and cannot stand for proof of the fact, now that the rule is before us for final determination. In the matter of the juror Myers, it is nowhere alleged that either defendant or his counsel were ignorant of his imperfect knowledge of English at the time he was sworn. The burden of this proof is distinctly upon the defendant, and a material part of it all is, that knowledge of these facts came to the possession of himself and counsel subsequent to the trial. We might therefore content ourselves with dismissing these reasons as not properly supported by evidence, for if these facts were known by either defendant or his counsel during the trial, their silence then would operate as a waiver of their right to be heard now.

But on account of the serious charges against this defendant, we have examined the reasons assigned, as if before us upon proper proof, and we are constrained to say, they have not impressed us as constituting sufficient ground for a new trial. First as to Newcomber's alleged loss of domicil here; it is con-

*See Com. v. Stokes et al., 3 YORK LEGAL RECORD, 220

ceded he resided here when his name was placed in the wheel; his removal to Baltimore was rather an experiment, according to his own account—if he liked the business and the place he intended to remain—if he did not his purpose was to return. He left a considerable part of his furniture here in the house he had occupied, and after remaining in Baltimore about two months he was not successful or not pleased and returned here again. It has been repeatedly decided in this State and elsewhere, that residence is a question of intention, and that is a conclusion of law from the facts in each particular case. But it is uniformly held that the intention to reside outside the State must be fixed and permanent, before the domicil is lost here and acquired elsewhere. We can gather no such intention from the evidence submitted. Nor does the alleged disqualifications of the juror (Myers) amount to any disqualification at all when tested by his own deposition. He had declared under oath, that he understood what the witnesses testified to and what the Court said in charging the jury. He obviously belongs to that large class of our population of German extraction, who, while not familiar with all the niceties of the English tongue, are sufficiently informed of its meaning for the practical purposes of our jury service.

The bank officers and others, whose depositions are now before us, with few exceptions, testified at both trials, that they believed the signature of Manifold to be genuine and not simulated; further than this they could not go and confessedly the evidence now offered of a comparison of hands by them is not legal evidence and could not be used if a new trial was granted. This duty of comparison of the alleged forged instrument with the test papers admitted in evidence is distinctly for the jury, and their duty and right to make it carefully, was greatly impressed upon them by defendant's counsel, to say nothing of our own charge. That they differed in opinion from those who have been produced as experts, is not a good reason for setting aside a verdict which two juries have concurred in pronouncing.

We therefore overrule the motion for a new trial.

COMMON PLEAS.

C. P. of Luzurne County.

Luzurne County v. Galland Brothers & Co.

Manufacturing machinery affixed to the premises by the lessee, is subject to taxation as real estate.

Case stated.

January 7, 1884. WOODWARD, J.—It appears from the facts submitted to us in the case stated, that the defendants are manufacturers, and, as such, are the owners of certain machinery upon which, for the year 1883, a county tax has been assessed. The question presented is, whether the machinery of the defendants is taxable, as real estate, for county purposes.

The house and lot are owned by one Fitzpatrick, and have been assessed with taxes against him as owner. The premises, however, are leased to the defendants for manufacturing purposes, and the machinery in question was set up and is being operated by them as already stated.

The Act of Assembly of 15th April, 1834, section 4 (Purd. 1359) provides, that "manufactories of all descriptions" shall be subject to assessment as real estate.

In the case of Patterson *v.* Delaware county (20 P. F. S. 381), it was held that, under the 32d section of the act of 29th April, 1844, machinery was properly taxed as real estate. This section, so far as manufactories are concerned, does not appear to be more definite or specific than the Act of 15th April, 1834, to which we have already referred.

The case of Patterson *v.* Delaware county, however, differs from the present one in this, that the machinery upon which the assessment was made, belonged

to the owner of the building, and was set up and operated by him. It would seem from the opinion of Butler, P. J., that he attached some importance to this fact of the ownership of the building, as well as the machinery. He held that two things were necessary to convert machinery into real estate, viz.: 1st, that it must be permanently attached to a building; and 2d, that it must be so attached by the owner of the building. It seems to us, however, that the permanency which the learned judge had in mind, must have meant nothing more than such a duration, or period of time, as would naturally be required to use it up, or wear it out. In other words, if the intention were to use the machinery for a given purpose so long as it would fairly perform the functions for which it was designed, then it would be a permanent attachment to the building.

In the case before us, there is nothing to show any purpose or intention to remove the machinery from the leased premises at any fixed time. We assume, therefore, that the defendants will have the right to use it in their manufacturing business, so long as they see proper to do so, or until it shall be rendered useless by wear. And in this view of the case, of what moment is it that the machinery was attached to the building by a lessee and not by the owner of the land? As many goods will be made and as many workmen will be employed, in the one case as in the other. The profits of the business will be substantially the same, as if the owner were also the manufacturer. The protection which the government and the laws afford to citizens engaged in any lawful calling, is extended to the person and the property of a lessee as well as of the owner of the soil. And therefore it would seem, that the machinery should be taxed without reference to the nature of the title by which the premises upon which it is extended, are held. Clearly, any other construction of the law would open a wide door to fraud, and prove a constant temptation for subterfuge and false dealing; at the same time, that it would relieve certain classes of manufacturers from their fair share of the burden of taxation.

The law makes *manufactories of all descriptions* real estate, and subjects them to taxation. The defendants are the owners of the kind of property contemplated, and therefore, in our judgment, they should pay the tax assessed upon their machinery. And, as we understand the case of Patterson v. Delaware county 20 P. F. S. 381, this is the interpretation of the law adopted by our Supreme Court.

It is now ordered that judgment be entered in favor of the plaintiffs, and against the defendants, for $2.38 and costs of suit.

C. P. of Luzurne County.

Caffrey v. Carle.

On a rule to open a judgment, unliquidated damages arising from a contract not a part of the judgment in controversy cannot be introduced to reduce the amount of the judgment.

Representations, when to be regarded as no more than the expression of an opinion.

Rule to show cause why judgment should not opened, and defendant let into a defense.

October 8, 1883, RICE, P. J.—The defense to this judgment, in all material particulars, rests upon the uncorroberated testimony of the defendant. He is contradicted by the plaintiff, and his testimony is inconsistent with the terms of the written agreement, which was drawn up to express the final views of the parties after a series of conferences and negotiations, and is also inconsistent with the testimony of Mr. Downing, who drew up the paper at the request of the parties. It is quite possible that there was an agreement between the parties as to the hiring of the plaintiff's team, but the weight of the parol testimony and the written agreement itself show that it was not part of the consideration of the note and judgment in controversy, nor of the agreement for which the note was given. This

being the case, the unliquidated damages for which the plaintiff may be liable upon a breach of the agreement of hiring cannot be off-set here. It is not alleged that the execution of the agreement of sale was procured by fraud, nor that it does not contain all that the parties intended that it should. In the absence of fraud and mistake, and of an express warranty, the alleged representations by the plaintiff that there was ice enough to supply the defendant's customers, especially as means of knowledge as to the quantity were equally accessible to both parties, and as the defendant did not purchase until he had in fact examined for himself must be regarded as no more than the expression of an opinion, and not as the means which produced the bargain. Hence, under the well recognized authorities, they do not constitute an equitable defense to the judgment.

The rule is discharged.

C. P. of Chester County.

Acker v. Moore.

Act of 22d March, 1814—Affidavit of attorney sufficient to oust jurisdiction of justice of peace—Construction of Statutes.

The affidavit that the title to lands will come in question in an action before a justice of the peace, under the Act of March 22, 1814, may be made by the attorney for the defendant, and the jurisdiction of the justices thereby ousted.

The decisions under the affidavit of defense law hold that it is not imperative that the affidavit should be made by the defendant personally, but that it should be so made unless cause is shown to the court why it should be made by another.

October 20, 1883. FUTHEY, P. J.—The record of the justice shows that this was an action of "trespass for damage done real estate of plaintiff." The defendant's attorney, C. H. Pennypacker, Esq., before the trial, presented his affidavit, made on behalf of the defendant, that the title to lands would come in question in the action, and asked that the justice dismiss the same under he provision of the Act of 22d March, 1814 (Purdon, 867, pl. 120). The justice determined that the defendant could not dispute the title of the plaintiff to the real estate and proceeded to hear and determine the case. The defendant took no part in the trial after the presentation of the affidavit.

The Act of Assembly gives a justice no discretion in the matter. By its express provisions, if the affidavit is made, his jurisdiction is ousted, no difference what the fact may be with regard to the matter. He cannot inquire into or determine the truthfulness of the affidavit, but must dismiss the proceeding and remit the plaintiff to the Court of Common Pleas. (Williams *v.* Smith, 3 Clark 22.)

The only question presented is, whether the attorney at law of a defendant can make the affidavit. The language of the act is "that if the defendant shall, before trial of the action, make oath or affirmation, &c." We do not regard it as imperative that the defendant, and he alone, shall make the affidavit. Circumstances may exist rendering it impossible for for him to do so, and yet where he should not be prevented from interposing the provisions of the statute. Where a similar question has arisen under the affidavit of defense law, the court have held that the defendant should make the affidavit, unless there is some special reason to the contrary, satisfactory to the court. This class of cases hold that it is not imperative that the affidavit should be so made by the defendant personally, but that it should be so made unless cause is shown to the court why it should be made by another. (Sleeper *v.* Dougherty, 2 Wharton 177; Hunter *v.* Peilly, 12 Cassey 509; Burkhardt *v.* Parker, 5 W.&S. 480; Gross *v.* Painter, 1 W. N. C. 154; Cline *v.* Wallace, Ib. 293; City *v.* Devine, Ib. 358.)

In the case before us, it satisfactorily appears that the question whether the title to land is involved is one purely of law, and, being so, we see no reason why the affidavit should not be properly made by the attorney. If made by the defendant personally, it would be done upon the opinion given him by his counsel.

We must reserve the proceedings and allow the parties to determine their rights in the Court of Common Pleas, which has unquestioned jurisdiction, if they think the amount in controversy will warrant it.

Proceedings reversed.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, JANUARY 31, 1884. No 48.

ORPHANS' COURT.

Groves' Estate.

Right to administer—Discretion of Register.

While the expressed wish of the decedent that A. should administer on her estate, would be strong ground to sustain his appointment if made by the Register or to secure his appointment pending a question of discretion before the Register, it is not a sufficient reason to reverse the grant of letters given to a fit person.

Appeal of Jacob Grove, from the decree of the Register of Wills, granting letters of administration on the estate of Margaret Grove deceased, to Josiah Grove.

W. C. Chapman, for appellant.

S. H. Forry, for appellee.

January 12, 1884. GIBSON, A. L. J.—The appellant and appellee are both sons of the decedent. This grant of letters to one of a proper class is an exercise of the discretion of the Register, and he has no power to revoke letters thus granted except for sufficient cause; Shomos Appeal, 8 P. F. S. 356. If properly exercised his discretion is not the subject of review in the Orphans' Court; Brubaker's Appeal, 2 Ont. 24. The only ground for reversing his action would be that of personal disability of the appointee.

The expressed wish of the decedent in her last illness that the appellant should settle up her estate, would be strong ground to sustain his own appointment had it been made and a contest raised, or to secure it pending a question of discretion before the Register; but I do not think it is of any weight to reverse the grant of letters if already given to a fit person of the right class. The question of disability as a ground of reversal still remains. Nor is the conduct of Josiah in securing the waiver of John's supposed rights of seniority, even if he had used language of intimidation in case of John's signing in favor of Jacob, a sufficient ground for reversal. John testifies: "I have nothing against either one of them as between my brother Jacob and Josiah. It would make no difference to me which of these would administer." He testifies further: "I signed the paper for brother Josiah of my own free will at the time I signed it." When asked whether he was not in favor of Josiah continuing to be the administrator he said: I know I signed two papers. I would rather withdraw my name and administer myself since it has gone so far. I have answered. There has been so much said that I would rather withdraw my name and administer myself." But this wish of his and the paper filed in his behalf at the argument, did not indicate on his part any objection to Josiah acting as administrator. They only show that he desired it to be understood, in case of the reversal of the grant of letters to Josiah, he had not waived any right to administer himself. This is, it is presumed, in anology the case of a widow who has renounced in favor of a certain person and the person named by her does not secure the appointment, then her right remains; McClellan's Appeal, 4 Harris, 116; Shomos Appeal, *supra*. But there is no dissatisfaction expressed by him with Josiah, and the other children and grandchildren appear to be indifferent, or about equally divided in their preferences.

The decisions invoked hold that letters ought not to be granted to an heir who has the principal part of the estate in his hand, or who is a litigant of the estate, as explained in Shomo's Appeal, *supra*, Ellmaker's Estate, 4 Watts 34; Beeber's Appeal, 2 Jones 157; Kellberg's Appeals, 5 Norris 129. But admitting that there is a question of a loan or gift of money by the decedent to Josiah or his wife, a suit is not all necessary, in as much as the Orphans' Court by means of exceptions to the account of the administrator can pass upon the question of surcharging him or not. An executor in the settlement of his account is chargable with a debt due

by himself to the estate: Bull's Appeal; 12 H. 24. If these letters should be revoked and granted to another the same question will arise as to a loan, gift, or advancement in the ascertainment of Josiah's share in the distribution. This cannot constitute a litigation or antagonism to the estate in the sense of the decisions cited, else estates would very frequently have to go to strangers, as all the children may have had money, and the question of gift or a loan is not avoided by a change of administration. In settlements of that character the Orphans' Court alone has authority: Bull's Appeal, *supra;* Dundas' Appeal, 23 P. F. S. 74.

There being no such antagonism or unfitness as will disqualify Josiah as administrator, the contention between him and Jacob can only be a question as to who is entitled to the commissions, which is not a matter of sufficient interest for the law to consider. The Register has the right to name any of a class, if a fit person, and he has certainly been in no default in naming one of the sons in whose favor the eldest son withdrew, and this court cannot reverse his action except for cause shown, which does not appear here. The appeal is dismissed.

COMMON PLEAS.

C. P. of Delaware Co.

Hannum vs. Worrall.

Will—Competency of testator—Habitual drunkard—Change of domicil—Legal holiday.

It is not conclusive evidence of incompetency to make a will that the testator has been found, by a commission in lunacy, to be a habitual drunkard.

The Act of Assembly making Good Friday a legal holiday does not forbid the court to sit on that day.

Issue devisavit vel non.

Rule for a new trial.

The testator, by a decree of the court, had been declared to be a habitual drunkard. His will was contested by the heirs on the ground of incompetency. The jury found in favor of the will and thereupon this rule was taken.

December 3, 1883, CLAYTON, P. J.—The case was carefully tried upon its merits. The verdict was in favor of the will. While the evidence would have sustained a verdict the other way, yet, if there was no error in the law, the decision of the jury should stand.

The first error alleged was in charging the jury that the commission in lunacy, finding the testator a habitual drunkard, was not conclusive evidence of his incompetency to make a will. The jury were charged that the proceeding in lunacy was *prima facia* evidence of incompetency, but not so absolutely conclusive as to preclude the jury from finding from its evidence a lucid interval at the time the will or codicil was made. We can see no good reason for changing our views upon this part of the law. The decisions of the Supreme Court are direct upon this point, and in accordance with the charge to the jury.

The second error assigned is to the jurisdiction of the court. It is alleged that the the domicil of the testator was in Chester county. If this is so, it is fatal to the whole case. The point was not raised upon the trial. Although an objection to the jurisdiction of the court may be made at any time, the evidence to support it ought to be very clear, especially where the plea is not filed until after a trial on the merits. Neither party asked the testator's domicil to be made one of the issues to be tried by the jury. We have carefully examined the evidence bearing upon the subject and do not think it sufficient, at this late day, to sustain the plea.

The evidence shows the testator to have been a resident of Delaware county at the time his will and codicil were made. The commission of lunacy issued

while his domicil was undoubtedly in this county. After his committee were appointed he removed to Chester county and, undoubtedly, died there. His codicil directs his body to be buried at Media, in Delaware county. As a change of domicil is always a question of intention, the direction as to his burial has some bearing on the subject. *Prima facia*, he was incapable of forming a deliberate intention to change his domicil, and the burden is upon those who allege a change to prove the intention of the testator to abandon his domicil in Delaware county and adopt Chester county as his permanent home. Williams on Ex., 9, § 1522, note P. "A domicil cannot be acquired by a party's own act during pupilage nor until a party is *sui juris*." School Directors vs. James, 2 W. & S., 558. See also Estate of John Thompson, 37 Leg. Int., 290.

The next alleged error is, that the court sat upon Good Friday, and, as this is a legal holiday, the proceedings are void. The verdict was not rendered upon Good Friday. We do not construe the Act of Assembly as forbidding the court to sit upon that day. The matter is discretionary with the court. As the verdict, however, was not rendered on Good Friday but the day after, and no objection was made at the time, the error, if one, cannot affect the proceedings.

The court permitted the will to be read to the jury on proof of the due execution of the codicil. This was in conformity with the well-settled rule, that a properly executed codicil will revive and republish the will to which it relates. Neff's Appeal, 12 Wr., 501. There was, therefore, no error in this. Upon the whole case we are satisfied there was no error in law. If the jury erred the court cannot review its mistakes. The verdict must, therefore, stand.

Rule discharged.

C. P. of Lancaster Co.

Hurst's Executor v. Caernarvon Cemetery Association et al.

Decedant's Estate—Will—Legacy—Collateral inheritance tax—When liable for—Out of what fund payable.

The will of testator provided that the sum of $500 should remain charged upon his farm forever, the interest on $100 thereof to be paid annually to the Caernarvon Cemetery Association for dressing and caring for his cemetery lot and grave; the interest on $200 thereof to be paid annually to the same association for fencing and keeping said cemetery in good order and repair, and the interest on the remaining sum of $200 to be paid to the minister in charge of the Methodist Episcopal Church in Churchtown for preaching the gospel.

HELD, That the portion of the legacy which was to be used for dressing and caring for the cemetery lot and grave of testator was not subject to collateral inheritance tax.

HELD ALSO, that the other portions of the legacy were liable for collateral inheritance tax, and that as the testator had made no provision for its payment out of any other fund or out of the residue of his estate, the same should be deducted from the money so directed to be charged on said real estate.

Case stated.

This suit was an amicable action agreed upon and stated for the opinion of the Court.

The facts agreed upon were as follows:

John S. Hurst, late of Caernarvon Township, Lancaster County, died November 21, 1881, having made his last will dated November 12, 1878, duly proved February 7, 1882, and remaining on file in the Register's Office at Lancaster, in and by which among other things he bequeathed, as follows, viz:

"Tenth. Also I order and direct that the sum of Five hundred dollars ($500) of the value of the farm or plantation on which I now reside remain in said property forever, and be applied in the manner and form following, to wit:

"A. The interest of One hundred dollars ($100) at five per cent., to be paid each and every year to said Caernavon Cemetery Association, and to be used to defray the expenses for dressing and caring for my said burial lot and grave.

"B. The interest on Two hundred dollars ($200) at five per cent., to be paid each and every year to the Caernarvon Cemetery Association and to be used to defray expenses for fences and keeping said cemetery in good order and repair.

"C. The interest of the remaining Two hundred dollars ($200,) at five per cent., to be paid each and every year to the minister in charge of the Methodist Episcopal Church in Churchtown for preaching the gospel."

The testator in his life-time purchased a lot in the above-mentioned cemetery, where his body now lies buried, which by another clause of his will he provided should be enclosed with posts and railing. He left a farm at 107 acres and 26 perches of land in Caernarvon township, on which he resided when his will was made and at the time of his death. This farm has since his death been sold by his executors under the direction of his said will, subject to the above charge.

The questions submitted to the Court for decision are:

Is the said legacy of five hundred dollars, or any part thereof, subject to collateral inheritance tax, and if subject to it, who is liable to pay the same?

Is it to be deducted from the principal sum, and the charge on the farm to be five per cent. less? Is it to be paid out of the accruing interest; or, is it to be paid out of the residue of the estate of testator.

If the tax is to be deducted from the principal sum, or to be paid out of the accruing interest, then judgment to be entered for plaintiffs for one dollar, and if it is to be paid out of the residue of the estate, the judgment to be entered for defendants for one dollar.

June 22, 1883, LIVINGSTON, P. J.—Is the legacy in this case, or any part of it, subject to the payment of collateral inheritance tax, and if so, how and by whom is the tax to be paid? appear to be the questions to be decided by the Court.

The one hundred dollars of the five hundred dollars mentioned in the case stated, the interest of which is to be applied to dressing and keeping his grave and burial lot in order, is not in our judgment subject to collateral inheritance tax. While it is true we are taxed in life and taxed in death, and from the cradle to the grave are taxed, on all we make or save, we believe a man in life may honestly and without being chargable with an intent to defraud the Commonwealth or evade the collateral inheritance laws, place in trust by will or charge upon his real estate devised to collateral heirs a sum of money the interest of which shall be sufficient for and annually applied to the purpose of dressing, caring for, and keeping his own grave and his own burial lot in good order and condition, and that such sum, so set apart or charged, is exempt from such tax.

With reference to the other four hundred dollars mentioned it the case stated, we are of opinion that under the Acts of Assembly as found on our statute books, and the decisions of our supreme Court with reference to collateral inheritance tax in this Commonwealth, said sum is subject to this tax, and that the tax must be deducted from and paid out of said money so directed to be charged on said real estate, the testator having made no provision for its payment out of any other fund, or out of the residue of his estate.

We, therefore, in accordance with the requirement of the case stated, direct judgment to be entered for the plaintiffs for the sum of one dollar.

Judgment accordingly.

Will—Construction of—Life Estate—A testator gave, devised and bequeathed "his entire estate, real, personal, and mixed, unto his wife Virginia, to be used and enjoyed by her as long as she lived," and ordered and directed that after her death, "whatever may be left should be converted into cash and be paid to Pater Ignatius Sagerer in trust, etc." The wife sold under articles of agreement the real estate of decedent to F. *Held*, that the wife had but a life estate in the real estate, and could not give a title in fee simple to the purchaser.—*Waldhoeffer v. Falk*, (Lancaster C. P.) 1 Lancaster Law Review 38.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, FEBRUARY 7, 1884. No 48.

Andrew C. Deveney.

Andrew Caslow Deveney was born in Springfield township, York county, in 1853, and was in his 31st year at the time of his death. His father was Levi Deveney, and one of his brothers is Hon. J. C. Deveney, a member of the Legislature from this county. He taught several terms in the public schools of the county and finally registered as a law student under the late W. H. Kain, Esq., who was the County Superintendent. He spent one term in the Law Department of the Pennsylvania University at Philadelphia and after passing a very creditable examination, was admitted to the Bar on June 24, 1878.

Mr. Deveney was a candidate for the nomination as Clerk to the Commissioner on the Democratic ticket in 1879, and last year was a candidate for the District Attorneyship nomination on the same ticket, but failed both times to secure the necessary number of votes, although he had many warm friends in the convention.

Mr. Deveney seemed to have inherited consumption, and had several severe attacks during the past six years, each of which left him the less able to resist the subsequent stroke. The attack from which he finally died confined him to his house in the beginning of the present winter, and grew more violent until it ended in his death.

Mr. Deveney was a young man of good qualities, and made many friends. He was acquiring a good practice, until his sickness prevented him from attending to his clients.

Yesterday afternoon the court suspended the hearing of the Hartman case, whereupon Frank Geise, Esq., announced the death of A. C. Deveney, Esq., a member of the Bar.

He referred to his early acquaintance with the deceased, having been his school teacher at one time. Later, he occupied the same office with the deceased, and during that time learned to appreciate his sterling virtues. He spoke of his industry and power to comprehend the intricacies of the law, and paid a glowing tribute to his memory, and ask that the court adjourn.

The motion was seconded by A. N. Green, Esq., who spoke of the deceased as a young man of fine abilities and unquestioned integrity.

Court then adjourned until nine o'clock this morning.

Immediately upon the adjournment of court a meeting of the bar was held in the court room.

The meeting was organized by the selection of Hon. Judge Gibson as president, and S. C. Frey, Esq., as secretary.

Judge Gibson paid a handsome tribute to the memory of the deceased, referring to his devotion to the interests of his clients, and his endearing qualities as a man.

On motion of G. W. Heiges, Esq., the court appointed a committee of five to draft the usual resolutions of respect to the memory of the deceased. G. W. Heiges, Frank Geise, A. N. Green, J. W. Heller and W. A. Miller, Esqs., were accordingly appointed as such committee.

They reported the following resolutions, which were unanimously adopted:

WHEREAS, Death has again entered the ranks of the York Bar, and removed from our number A. C. Deveney, therefore,

Resolved, That by the death of A. C. Deveney, the bar has lost a bright member, painstaking in his investigations of legal questions, and who gave promise, before he was disabled by the disease that has proven fatal, of a successful professional career.

Resolved, That we condole and sympathize with the surviving widow and relatives of the deceased in their great affliction, and that as a last mark of our respect for the deceased we will attend his fun-

Resolved, That a copy of these resolutions be sent to the widow of the deceased, that they be published in the newspapers of York, and that they be presented to the court at its next session for the purpose of having them entered upon the minutes of the court.

GEORGE W. HEIGES, Chairman,
FRANK GEISE,
J. W. HELLER,
A. N. GREEN,
W. A. MILLER,
} Committee.

E. D. Ziegler, Wm. A. Miller, A. N. Green, D. K. Trimmer, Geo. W. Heiges and Richard E. Cochran, Esqs., were appointed pall-bearers.

The meeting then adjourned.—*York Daily, January 30, 1884.*

QUARTER SESSIONS.

Q. S. of Fulton County.

Poor Directors of Bedford County v. Poor Overseers of Licking Creek Township.

Poor Districts—Liability of.

The Directors of the Poor of Bedford county notified the Overseers of Licking Creek township to remove an insane inmate of the Bedford County Almshouse, but they failed to do so. A bill was presented to them for the maintenance of said inmate, which they refused to pay. HELD, That the plaintiff was entitled to recover.

An insane person is within the meaning of the Act of 1836.

Where there has been a removal and an acceptance without appeal, the district accepting is liable to the district removing for costs and charges.

In re Rule upon the Overseers of the Poor of Licking Creek township, in said county, to compel payment by them of the sums of money necessarily expended for the use of John Stauffer, and in maintaining him, by the Directors of the Poor of Bedford county.

Submitted on petition and answer.

MCLEAN, P. J. The order of removal in this case, unappealed from, is conclusive upon all parties. Renovo Overseer vs. Half-Moon Overseers, 28 P. F. Smith 301.

The petition sets forth, either at the time of the arrest, which was in October, 1882, or after the entry of the *nol pros* on the 24th of November, 1882, the Overseers of the Poor of Licking Creek township, were requested, and repeatedly requested afterwards, to remove Stauffer, etc. This is not expressly denied or replied to in the answer.

But it is set out by the respondents in the answer that, on or about the first day of January last, a demand had been made upon them by petitioners for the payment of a bill running from the 8th of October, 1882, to the 8th of January, for the support of said Stauffer, and alleged damages done by him to the building, furniture, etc., amounting to $49.70. This bill, the overseers to whom such notice was given, neglected or refused to pay. So there does not appear to have been unreasonable or inexcusable delay in giving notice to the Overseers of Licking Creek township of the name, circumstances and condition of Stauffer. They should at once have proceeded themselves to remove Stauffer, and prevented the further expenditure of money in his maintenance by the Directors of the Poor of Bedford county. The Respondents had abundant information to make it incumbent upon them to move in the matter, and to render the order of removal three months afterwards unnecessary.

The answer admits the mental infirmity of Stauffer. The brief interval of two days between the 7th of October, when he was arrested, and the 9th of October, when he was admitted into the insane department of the Bedford county Almshouse, constitutes no sufficient answer to the rule.

The case is very much like that of Charles Naus, in Overseers of Sugarloaf township v. Directors of the Poor of Schuylkill County, 8 Wr. 481, which decided that although an insane person is not within the letter of the 23d Section of the Poor Law of 1836, 2d Purdon's Digest, p. 1759, pl. 38, he is within the equity of the act, and a proceeding like that which we are now considering was sustained as not wresting the statute a whit from its spirit; *vide* Renovo Overseer v. Half-Moon Overseers, *supra*.

Then we have the very case provided for by the Act of 15th of April, 1867, P. L. 84, 2d Purdon's Digest, 1157, p. 123, where there has been a removal and an acceptance without appeal. The district accepting shall be liable to the district removing for costs and charges. As we have said, the answer does not show that the costs and charges in this case are not reasonable and just; Directors of the Poor of Blair county vs. Overseers of the Poor of Clarion borough, 10 Norris 431; Overseers of Poor of Williamsport vs. Board of Guardians of Poor of Philadelphia, 7 W. N. C. 232.

The poor laws of this Commonwealth are a system created for the purpose of giving immediate relief. The Directors of the Poor can no more wait for money than Stauffer, the sinews supplied to one strengthen the other, and the needs of both are immediate; Moore *et al.*, Overseers of the Poor of the City of Williamsport vs. City of Philadelphia; 13 Phila. 425, same case, 36 Legal Int. 174.

Rule made absolute.

Road in Lower Chanceford Township.

Road Damages—County Commissioners. Right of.

The reviewers of a proposed road reported that the road was of such public utility that the damages ought to be paid by the county. The Commissioners reported that the damages assessed were excessive. The report of the viewers were confirmed, but on application of the Commissioners, a review of damages was granted. An order was issued to open the road, whereupon the Commissioners moved for a suspension of this order until their review of damages was disposed of. HELD, That the motion must be refused.

The ultimate opening of a road does not depend upon the amount of damages to be paid by the county.

Rule to suspend order to open a road in Lower Chanceford township.

G. W. Heiges, for rule.

H. W. McCall, contra.

July 30, 1883, GIBSON, A. L. J.—The fourth section of the act of the 17th of February, 1860, P. L. 62, relating to roads and bridges in York County, makes it the duty of the court to examine the amount of damages assessed by the road viewers; "and if it shall appear to said court that the amount of damage assessed is so small that the public interest will be advanced by paying the same and opening the road, the court shall decide accordingly; but if the court shall be of the opinion that the necessity for the road will not justify the county in paying the damage assessed, the court shall refuse to confirm the report of said viewers;" the immediately preceeding section (Sec. 3) makes it the duty of the viewers to state in their report, "whether in their opinion the road is of such public utility that the amount of damages ought to be paid by the county."

Section sixth provides that all reports on roads be laid before the county commissioners, "to be examined by them; and it shall be their duty to report for the information of the court, what they know in the premises." And by the ninth section, it is provided, that notice shall be given "to one of the county commissioners of the time and place of holding all views, re-views and re-re-views, for the assessment of damages held under authority of this act."

The report of the viewers in this case, states that in their opinion the road is of such public utility that the amount of damages assessed by them ought to be paid by the county. This report was laid before the county commissioners and was examined by them, and they reported for the information of the court that the damages assessed were excessive.

The report of the viewers was confirmed by the court. A review of damages on the application of the county commissioners was granted on the 16th day of April, 1883. On the 28th of May, 1883, a petition for review of the road in ques was filed, and a rule to show cause why the same should not be allowed, was granted returnable June 11, 1883, and the proceedings stayed in the meantime. The petition for a review of the road, is, of course, too late. But on the hearing of the rule to show cause, a motion was

made that the order to open the road be suspended until the question of damages is disposed of, on the commissioners' review.

The practice has been, in case the viewers report favorably to the opening of the road, to confirm their report, unless exceptions are filed to its confirmation. The effect of the exceptions is to suspend the confirmation until all questions raised by them are decided. But the report once confirmed, the duty of the court, in respect of the necessity or the utility of the road and the payment of the damages, is ended. The confirmation of the report of the viewers, unless a review or second view is asked for within the prescribed time, is *res adjudicata* as to the opening of the road. The duty of the court as to the examination of the damages is performed. *Omnia presumuntur rite esse acta.*

In this case, the County Commissioners made report for the information of the court that the damages were excessive. This they were not prepared to sustain at the argument. And they have now asked for a review of damages on the ground that the damages assessed are excessive. The motion is to suspend the order to open the road until the report of these reviewers of damages is returned, is based upon the idea that the ultimate opening of the road depends upon the amount of damages to be paid by the county. This is a misapprehension of the law. That consideration can only arise upon the confirmation of the road report, and not upon a review of damages. Besides the question whether the damages are excessive or not, is a very different question from that as to whether the necessity or utility of the road will justify the county in paying the damages. The review now pending can only raise the question as to the amount of damages to which the landholder is entitled. By the Act of 13th of June, 1836, Sec. 7, P. L. 556, the owner of land through which a road is opened may petition for reviewers to assess the the damages sustained by him, and the county must pay such damages. This was a right of the landholder and no one else. The Act of 1860 was intended to have an adjudication in the first instance whether the county should pay the damages. The landholder can still have his review if dissatisfied with the amount awarded to him. Whether a review by the Commissioners can reduce the award will be a question raised by this review. But it cannot suspend the order to open the road.

Motion overruled and order to open issued.

Corporations—Capital Stock—In re Capital Stock (Opinion of Atty. Gen'l,) 2 Chester County Reports, 185.

Under the 3d section of the Act of 29th April, 1874, no charter can be granted where the application fails to state that ten per centum of the capital stock has been paid in cash to the treasurer of the intended corporation.

2nd PENNYPACKER.

The Second Volume of Pennypacker's Pennsylvania Supreme Court Reports, is just out, and upon close examination proves to be a most valuable work for Pennsylvania lawyers. It is an excellent compilation of such cases as were adjudged by the Supreme Court, at Jan. Term, 1882, and were not designated to be reported by the State Reporter. It contains the names of all the Judges of the Courts of Common Pleas, and Orphans' Courts, together with all the counsels whose cases appear and all Masters, Referees, Auditors and Commissioners. The cases are according to counties, arranged alphabetically. It also contains a full and complete index, and list of the names of all cases reported, and cases cited in the opinions of the Supreme Court. It is finely printed, and well bound, and comprises over six hundred pages and is the production of the well known Law Publishing House of Rees, Welsh & Co., of Philadelphia.

YORK LEGAL RECORD.

VOL. IV. THURSDAY, FEBRUARY 14, 1884. NO 50.

COMMON PLEAS.

Siltzer v. Wrightsville Borough.

Borough—Negligence—Board Walk—Repair of.

The General Borough Law of 1851 invests municipal authorities with the management and control of the borough highways, and this power includes the maintenance of such highways.

The duty to supervise and repair cannot be escaped because the act does not in so many words charge the corporate officers with it.

It is the duty of the corporate officers to exercise reasonable vigilance in the supervision and repair of structures over which their jurisdiction extends.

Mere absence of notice does not necessarily absolve a municipal corporation from the charge of negligence.

Where the evidence shows that the defect in the board-walk was patent before the accident, and could, with the exercise of reasonable diligence on the part of those having charge of it, have been discovered and repaired, actual notice is unnecessary.

Exceptions to referee's report.

This was a suit for damages brought by plaintiff against defendant for injuries received by reason of a defective sidewalk, H. L. Fisher, Esq., for the plaintiff, and John Gibson, Esq., for the defendant, appeared before the referee, James B. Ziegher, Esq., and conducted the case before him.

From the referee's report we make the following extract:

"This is an action of trespass on the case brought by the said Charles K. Siltzer, plaintiff, to recover damages for an alleged injury sustained by him on a certain public sidewalk, in the said Borough of Wrightsville, on the night of the 30th of August, 1880. It appears from the evidence that by act of Assembly, entitled "An act to erect the towns of Wetphalia and Wrightsville into Borough" approved April 14, 1884, Pamphlet Laws 1833 and 1834, page 313 and so on to page 319, the said defendant became a corporation or body politic, and that it afterwards accepted and became subject to the provisions of the general borough law of 1851. It also appears from the evidence on the part of both plaintiff and defendant that the place where the alleged injury occurred is in front of what was formerly known as the Northern Central Depot, on the west side of Front street, between Hellam and Chestnut streets, in said Borough of Wrightsville. It appears further, from the evidence, that the sidewalk along the west side of Front street is composed of brick, stone and plank; that is to say, some of the houses have brick pavements, some wooden pavements, and others stone pavements in front of them. The sidewalk where the alleged accident occured was composed of pieces of plank some fifteen or sixteen feet long and about a foot in width, which were laid lengthwise, parallel with the street, upon wooden sills placed at proper distances apart. Four of the planks laid side by side constituted the sidewalk at this place. The length of the sidewalk was not definitely stated in the testimony, nor is it material to the question at issue. It was not disputed on the part of the defendant that there was a defect in the sidewalk at the place where the plaintiff alleges he was injured. The evidence on the part of the defendant shows that after the alleged injury was sustained the defect in the sidewalk was repaired by employes of the Northern Central Railway Company. The testimony of both sides shows that the defect or hole in the sidewalk was from two and a half to two and three-quarters inches in width and about two feet long, and Adam Wolf (the first witness called by the defendant) testified that he repaired the defect, and that 'right around the crack it looked as though it had rotted or decayed.' No attempt was made by the defendant to show that the plaintiff was guilty of contributory negligence at the time he sustained the alleged injury. The referee is of opinion, therefore, that there are but two questions to be considered in the decision of this case; and they are: 1st. Was the defect in the sidewalk the cause

of the plaintiff's injury? 2nd. Was the defect in the sidewalk such a want of repairs as would render the defendant liable for damages for an injury resulting therefrom? Upon these two propositions, substantially, the counsel for the defendant based his argument before the referee.

The referee found that the defect in the sidewalk was the cause of the plaintiff's injury. On the second question he says:

As has already been stated, no denial was made on the part of the defendant that there was such a defect in the sidewalk as that described by the witnesses, nor was it denied that it was within the corporate limits of the said Borough of Wrightsville. And while the defect was repaired by employes of the Northern Central Railway Company, there is no evidence that the said company had any such control over the said sidewalk as would impose upon it the duty to remedy the defect. So far as the evidence shows the sidewalk was under the control of the defendant, and what the employees of the railroad company did was done entirely gratuitously. By the terms of its charter the defendant was clothed with power to regulate the public highways within the corporate limits. By the records of the Court of Quarter Sessions of the Peace of York County, it appears that under date of August 26, 1867, a decree was made "that the said Borough of Wrightsville shall hereafter be subject to the restrictions and possess all the powers and privileges conferred by said general borough law, approved the 3rd day of April, 1851;" and by Articles 5 and 6 of Section 2 of said Act they are empowered "to require and direct the grading, curbing, paving and guttering of the side or foot walks, by the owner or owners of the lots of ground respectively fronting thereon, in accordance with the general regulations prescribed: to cause the same to be done on failure of the owners thereof, within the time prescribed by the general regulations, and to collect the cost of the work and materials with twenty per centum advance thereon." In pursuance of the power thus conferred, by an ordinance of date June 22, 1868, which was offered in evidence and marked "'A. J. B. Z.'" enacted and ordained that, from and after thirty days from the date of said ordinance the following regulations relative to sidewalks or pavements, gutters and culverts, shall obtain and have full force and power with other by-laws of this corporation, to wit: "Section 2. Be it further ordained and enacted by the authority aforesaid, that from and after the expiration of the aforesaid thirty days, it shall become the duty of the property owners of said Borough of Wrightsville, to lay, or cause to be laid down or made, under the direction of the town council, or its committee on streets, &c., good and sufficient pavements or foot walks, of brick, stone, or other suitable material, at all points or places where the same shall be deemed necessary by the corporate authorities aforesaid, for the convenience and comfort of citizens, together with the paving of necessary gutters and culverts, and laying of sufficient crossings of the same, as shall be directed by the counsel or its committee aforesaid."

Section 3. Be it further enacted: "That in case of failure or neglect on the part of any person or persons, property owner or owners, as aforesaid, who shall have been duly notified to make and pave the foot walks, gutters, or culverts in front of his or her property, to make or commence the improvement required for the space of ten days from the date of such notice given, then the same shall be done by the corporation, and the costs thereof for labor, material, &c., furnished and supplied, together with twenty per centum additional, be collected from such delinquent as by law provided." The duty of keeping its sidewalks or pavements in proper repair was thus clearly imposed upon the said defendant, and a neglect to do so as clearly renders it liable to respond

in damages for an injury resulting from a neglect of such duty. In the case of Erie City v. Schwingle, 10 Harris 384, Black, Chief Justice, delivering the opinion of the Supreme Court, said: "The principal question in this case is, whether a city corporation, bound by its charter to keep its streets in repair, is liable for an injury occasioned by neglect to do so. Every highway or thoroughfare, which the public has a right to use, must be kept, by somebody, in such order that it can be safely used, and if any serious injury happens to an individual in consequence of its bad condition, those who are bound to repair must answer in damages. In Beatty v. Gilmore, 4 Harris 463, a person who had dug a hole in the pavement, and violated his duty by leaving it exposed, was held liable by a party who fell into it and broke his leg. In Bartlett v. Crozier (15 Johnson 250,) an action was sustained against an overseer of the highway who had the means of repairing the roads in his hands, but neglected to do it, and caused a loss, to the plaintiff. In Townsend v. The Susquehanna R. R. Co. (6 Johnson 90) a private corporation which had failed to keep up one of its bridges, was held liable for a similar loss. In Dean v. New Milford Township (5 W. & Ser. 545,) it was decided that damages might be recovered against a township for the injury sustained in consequence of the non-repair of a public road. And in the Commissioners of Kensington v. Wood (10 Barr 93,) it was said by this court that the liability of the corporation for any injury arising from the unskillful, inartificial, or improper manner in which the paving and grading of a street was done, could not be controverted. To these may be added the case of Pittsburgh v. The Owners of the Steamer Mary Ann (10 Harris 54, &c.,) in which we held that the city corporation, having the care of a port, was responsible for the loss of a vessel which had been wrecked for the want of a safe landing place. I have cited these several cases to show that a party bound to repair, whether it be an individual, a private corporation, a township, district or city, must perform the duty or pay, in an action on the case, for all injuries to persons or property, which may be caused by the omission." In McLaughlin v. City of Corry, 27 Smith 109, Justice Gordon delivering the opinion of the Supreme Court, said: "That a municipal corporation, such as a city, borough, township, or county is liable for damages arising from the neglect of its officers in not keeping its streets, roads, and bridges over which it has jurisdiction in proper repair, is established by many authorities. Among others, Dean v. New Milford Township, 5 W. & S. 545; Pittsburgh v. Grier, 10 Harris 54; Allentown v. Kramer, 23 P. F. Smith 406; Humphreys v. Armstrong County, 6 P. F. Smith 204. These cases proceed upon the principle that the various municipalities have full and complete control of and power over the roads, streets and bridges within their several precincts, and that they are charged with the duty of their proper construction and repair." . . . . "If the city authorities were negligent in allowing a dangerous abstruction to exist in the public highway, which they could have removed, and the plaintiff was injured thereby, without any fault of his own, the city was undoubledly liable for the damages which he suffered." In the case of Norristown v. Moyer, 17 P. F. Smith, 356, Judge Ross, who tried the case in the court below, and whose charge to the jury was afterwards adopted by the Supreme Court, says on page 362, "Under this charter the repairs of streets, and the removal of nuisances therefrom is a duty clearly enjoined by statute, and it is authoratively ruled, that a corporation, which is bound by its charter to keep its streets in repair and remove nuisances therefrom is liable for an injury occasioned by its neglect to do so, and it is not material whether the neglect was wilful or not." Nor was it necessary

that the defendant should have had actual notice of the defect in the said sidewalk to render it liable for damages. If it remained there long enough to attract general attention the corporation was affected with constructive notice; McLaughlin v. City of Corry, *supra*. But in this case the defendant had actual notice of the defect in the sidewalk through its then supervisor, Joseph Shenberger, who testified that it was his duty as said supervisor to keep the streets and bridges in repair; that he saw this hole in the sidewalk, and yet made no effort to repair it, or have it repaired, until after the plaintiff was injured. The referee holds that it was the duty of the defendant, thus affected with actual notice of the existence of the defect, to have caused the owner of the property to put the sidewalk in a safe condition, and upon failure of the owner to do so to have caused the same to be done at the expense of the owner. Not having done either, the referee finds it was guilty of negligence, and that it must respond in damages to the plaintiff. The remaining question to be considered is the amount of damages to which the plaintiff is entitled. In the case of the Pennsylvania Railroad Co. v. Allen, 3 P. F. Smith 276, it is held to be the law "that in actions for personal injuries, sustained by a passenger in consequence of the negligence of a passenger carrier, plaintiffs are entitled to recover pecuniary compensation for pain suffered; and that juries in assessing damages may consider this as an element." In the case of Laing v. Colder, 8 Barr, 479, Judge Bell, who delivered the opinion of the court, says: "In estimating damages the jury may consider not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured, and any incurable hurt inflicted; for these may be classed among the necessary results." In the case of the Pennsylvania and Ohio Canal Co. v. Graham, 13 P. F. Smith 290, the same doctrine is reasserted. In the case of McLaughlin v. The City of Corry, *supra*, the plaintiff's seventh point on the trial of the case, in the court below, was as follows: "In estimating the damages the jury should allow not only for the direct expenses incurred by the plaintiff by reason of the injury, but also for the privation and inconvenience he is subject to, and for the pain and suffering, bodily and mental, already experienced, and likely to be yet experienced, as well as for the pecuniary loss he has sustained, and is likely to sustain during the remainder of his life, from the disabled condition of his arm, and the difference it has occasioned in his ability to earn wages." The court below refused to affirm this point, and the Supreme Court afterwards, through Judge Gordon, who delivered the opinion, said that the point should have been affirmed by the court below. The evidence of Dr. Thompson shows that the plaintiff was under his treatment from a day or two after the injury was sustained, to wit: the 30th day of August, 1880, until the 18th day of November of the same year, that being the last time he prescribed for him. Dr. Thompson also testified that the plaintiff suffered very severe pain in consequence of the injury to his ankle; that at the last time he examined the foot, to-wit: on the 3rd day of June, 1881, some nine months after the injury was received, the pain caused by pressure upon the injured parts, and by the moving of the foot inwards and upwards, indicated to him that the parts were not entirely reunited. There was no evidence given to show the permanent disability of the plaintiff to follow his usual avocation, other than that if his ankle continued as it was when last examined, his ability to follow his avocation would be to some extent impaired. The plaintiff testified that he was prevented from attending to his usual business until the second week of November of the year he was injured; that he was able to earn some days one dollar; some

YORK LEGAL RECORD.

VOL. IV. THURSDAY, FEBRUARY 21, 1884. NO 51.

days a dollar and a half, at his usual business, which was that of a day laborer. The referee having carefully considered all the evidence and the rules of law applicable to like cases, awards in favor of the plaintiff and against the defendant the sum of three hundred dollars ($300.00) damages with costs of suit.

To this report exceptions were filed by the defendant. Mr. Gibson having been elected judge, Messrs. Blackford & Stewart appeared for the defendant.

February 11, 1884, WICKES, P. J. The referee has found that a defect in the highway caused the injury complained of, and has determined the amount of damages sustained. These questions are eliminated from the consideration of the case at this time, not having been touched on the argument of the exceptions filed to the referee's report. The ground upon which we are asked to set the report aside, and enter judgment for the corporation defendant, is that the borough of Wrightsville is under the general borough law approved April 3, 1851, which does not, it is said, impose upon the corporate officers the duty to repair their sidewalks and streets, and that hence, without proof of notice, no liability can be fixed upon them.

We will not attempt to enumerate the powers and duties conferred by the act in relation to the streets, lanes, alleys, &c. of the borough. Suffice it to say that it is manifest from a careful reading and considerations of its provisions, that it was the intention of the legislature to invest the municipal authorities with the management and control of the borough highways. This purpose of the legislature is referred to by Mr. Justice Woodward in delivering the opinion of the Court in Norwegian street, 31 P. F. S. 353, where in commenting upon this act and others, he says "the provisions quoted from the several statutes referred to, indicate the general legislative intent to secure uniformity of plan, and adequate municipal supervision in the establishment and *maintenance* of borough highways." And again, said the same Justice, "it has been the policy of all recent legislation relating to boroughs of the Commonwealth to subject the highways within their limits to the control of the municipal authorities as exclusively as was consistent with the duty of affording protection to the interests of individual citizens." But we are met with the argument that notwithstanding the large powers given the borough officers in relation to the highways, that nowhere is the duty to keep them in repair, imposed by the statute. In *totidem verbis* it is not.

But substantially the same argument was addressed to the Court in re Vacation of Osage street, 9 Nor. 117, when it was objected that the borough officers had no power to *vacate* a street, because the acts did not, in terms, confer it. But the Supreme Court said "it is true that in the second section enumerating the powers of borough officers * * * the word *vacate* does not occur. But all the provisions of the act must be considered," and it was held the act conferred this power. In this opinion much stress was laid upon the following language contained in the section referred to "they shall have all other needful jurisdiction over the same," to wit the streets, a power afterwards repeated in the same act, 1 Purdon 174, pl. 92.

We do not think the duty to supervise and repair can be escaped because the act does not in so many words charge the corporate officers with it.

We do not mean that municipal corporations are in any sense insurers of the safety of their highways, or of those who pass over them—we only mean to decide that under a statute conferring such powers and duties as are contained in the act of 1851, something more is to be done by the borough authorities, than sit quietly

down and wait until the citizens notify them that their highways are out of repair. The right to recover damages for injuries sustained by reason of dangerous places in the streets, including the sidewalks, proceeds upon the ground of a negligent omission on the part of the corporate officers to perform a duty imposed upon them by law—and that duty is one of reasonable diligence in the supervision and repair of structures, over which their jurisdiction extends.

In Vanderslice *v.* City of Phila., 13 W. N. C. 373, where the damage resulted from the breaking of a sewer, the question of notice was considered, and the learned Justice who delivered the opinion of the Court, followed closely the reasoning and the text of the opinion of the Court of Appeals of New York in McCarthy *v.* City of Syracuse, (46 N. Y. 194.)

In both cases, the doctrine is affirmed, that "mere absence of notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair * * * involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time and preventing them from becoming delapidated or obstructed. When the obstruction or delapidation is an ordinary result of the use of a sewer which ought to have been anticipated, the omission to make an occasional examination and to keep the sewers in apparent good repair is a neglect of duty which renders the city liable." There is not one word of this which does not as well apply to a board walk as to a sewer, for a board-walk is at least as perishable. We do not however understand the language cited to mean anything more than that *actual notice* is not required. A distinction is taken in the case, between defects that are latent and those which are open and readily observed upon inspection. In the one case actual notice is evidently meant, on the other notice either actual or constructive. Said the learned Court "the city is presumed to have knowledge of an open defect after a reasonable time has elapsed for its ascertainment and removal." The act of 1851, confers upon the municipal officers ample powers for the management and control of brorough affairs, and in no department are they more completely equipped with power, than in their jurisdiction over the borough highways. Their duty in terms is to "remove nuisances," and they are armed with the power to tax *ad libitum*. Having then the authority, and holding the purse strings, there is no hard-ship in the rule which requires them to exercise reasonable diligence in looking after the sidewalks and streets—and this is the standard of their duty in this regard. Has it been fulfilled in this case.

The referee has found *actual* notice, because the supervisor of streets testified that he saw this hole in the sidewalk "just before" the accident. How long before, would have been a most pertinent inquiry, but was not made. It is contended the evidence was insufficient to support such a finding, and if this was the only evidence from which notice could be inferred, it would perhaps be our duty to set aside this report.

But under the act of April, 1868, (P. L. 782) the Court is permitted to look into the evidence as well as the law and to enter such judgment as it may deem proper.

Was there then sufficient evidence to warrant the finding of *constructive* notice to the corporate officers.

Jas. L. Kerr, (page 66 notes of evidence,) testified "I have noticed the hole frequently in passing up and down before this accident."

Anne Olewiler, (pge 12,) I walked over this (board walk) last summer and stepped in a broken plank once, (describing the location as the same.) It was before Mr. Siltzer was hurt.

Israel Jacobs, (pge 17,) I was acquainted with this sidewalk, * * * I got my

foot in it one evening * * * It was before this accident happened * * * Can't say whether a long or short time before, but it was last summer."

Surely it is a reasonable inference from this evidence that the defect in the board-walk was patent before the accident and could, with the exercise of reasonable vigilance on the part of those having charge of it, have been discovered and repaired.

This view is strengthened by the absence of any proof of watchfulness at all by the borough officers. Had they shown proper diligence coupled with want of notice, there would be good reasons for excusing them—but we must take the case as presented, and upon this point alone, the only one urged upon us, it would be idle to recommit the report or send the parties to a jury.

We do not lose sight of the argument that the borough could not in the first instance have made this repair, even conceding the obligation to do so—because the statute (1 Purdon 167 pl. 26) and the ordnance require the owner of the adjoining lot to construct the sidewalk within ten days after notice from the borough authorities to do so. But it must be observed, that the fact that borough officers are requested to notify lot owners of their duty in this regard, points to the necessity of inspection and supervision. If the lot owner fails to repair, then the borough may do so and file its lien—so that assuming the statute and the ordinance to refer to the repair of worn-out sidewalks, as well as to their original construction, the borough has still the duty resting upon it to do this work, either mediately or immediately, and it can scarcely be permitted to plead its omission to notify the property owner, as a defence to this action.

We, therefore, after a careful consideration of the law and facts of this case, dismiss the exceptions, confirm the report, and enter judgment for the plaintiff thereon.

The defendant has taken out a writ of error, and the case goes to a higher tribunal for final adjudication.

C. P. of Lancaster Co.

Weaver et al. v. Steacy et al.

Sheriff's Sale—Distribution of proceeds Three hundred dollars exemption—Taxes—Act of June 2, 1881.

In the distribution of the proceeds of a sheriff's sale of real estate, if the defendant has waived the benefit of the exemption laws in three judgments, he cannot claim it as against a judgment creditor in whose judgment there is a waiver; Pitman's Appeal, 12 Wr. 315, followed.

A claim for taxes, under the Act of June 2, 1881, (P. L. 45), must state what taxes are claimed and when levied, and also in all other respects must conform strictly to the Act of Assembly. As the requirements of the Act were not observed in this case, the claim was not entitled to priority of payment allowed by the Act.

Where a party is clearly entitled to the balance of the fund for distribution, the Court will not subject it to the costs of an audit, but will order the sheriff to pay such balance over to the party legally entitled to it.

Rule to show cause why the balance in hands of the sheriff should not be paid into Court.

Under and by virtue of a writ of *venditioni exponas* issued to April Term, 1883, No. 44, the real estate of Morris Cooper, one of the above named defendants, was sold by the sheriff on April 7, 1883, for the sum of $6,832.38. At the time of the sale by the sheriff there were open, unpaid and remaining as liens on Cooper's said real estate, six judgments.

The first four judgments have been paid in full by the sheriff out of the purchase money realized from said sale, and there remains in his hands an unappropriated balance of $301.91. The whole of this balance is claimed by W. D. Weaver *et al*, on their judgment to August Term, 1879, No. 266. Part of it is claimed by Morris Cooper, the defendant, under the exemption laws of the Commonwealth, and a claim is only made for $63 of it for taxes against Cooper which remain unpaid. The sheriff being in doubt as to which of the claimants were entitled to the fund, through his counsel, asked for and obtained a rule to show cause why the same should not be paid into Court.

June 20, 1883, Livingston, P.J. Should the rule in this case be made absolute, and the fund subjected to the costs of an audit? Is the defendant entitled to the benefit of the exemption laws? Is the collector of

taxes entitled to be paid prior and in preference to the judgment creditors?

Three of the judgments against defendant contain waivers of the benefit of the exemption laws; two of them being prior to the judgment of Weaver *et al.* The defendant Cooper, having waived his right to the benefit of the exemption laws in those judgments in favor of plaintiffs therein cannot claim it as against the judgments of Weaver *et al.* This is rendered perfectly clear on reference to the opinion of the Supreme Court in Pitman's Appeal, 12 Wr. 315, and this disposes of the claim made by Cooper, the defendant.

The claim made for taxes is not in writing. The claimant does not state what taxes are claimed, or when levied. He simply claims $63 for taxes. The act of June 2, 1881, P. L. 45, declares, "That from and after its passage, all taxes, whether county, township, poor, school, or municipal taxes assessed by competent authority upon real estate in this Commonwealth, except in cities of the first, second, and fourth classes, shall be a first lien from the date of levying the same upon the real estate upon which they are levied, and in all cases where such taxes cannot be collected from the owners of such real estate, or the tenants thereof, or persons, companies, or corporations assessed for such taxes under existing laws shall, on or before the first day of January next after the assessment thereof, be returned by the persons having such taxes for collection to the commissioners of the county in which they are assessed for collection according to the existing laws, and to be recorded as a lien in a book to be kept in their office for that purpose for use as a reference for all persons interested, to be called the Tax Lien Record, in which such return shall be entered in full with a proper index thereto, both to the township or borough where located, and to the name of the parties assessed for such taxes respectively. That such returns shall contain a statement of the amount of each kind of tax so returned, the names of the parties assessed with the same, the year when such taxes were assessed, a sufficient description by boundaries or otherwise of each separate lot or tract, and about the quantity of the same, and the township or borough in which it is located; that the person making the same has a warrant for the collection of such taxes, and the date thereof, and that after a proper effort at the proper time, he could not find sufficient personal property by a legal sale of which such taxes or any portion thereof could have been collected, which returns so made shall be signed and verified by oath or affirmation of the persons respectively making the same, and when recorded as aforesaid shall thereafter be the first lien on the real estate upon which they are assessed respectively for the term of two years from the first day of July next after they are returned and recorded as hereinbefore provided, and such record shall be notice to all persons, and a certified copy thereof signed by a majority of the commissioners or the commissioner's clerk in whose office such record is kept, and attested by the official seal of office, shall be prima facie evidence of the amount of such taxes in all cases relating to the same, and upon payment of such taxes the record of the same shall be satisfied by a majority of the proper commissioners having it so marked, which shall be attested by them.

"That upon any judicial sale of such real estate for purchase money or otherwise during the continuance of the lien of such taxes as hereinbefore provided, such taxes shall be first paid out of the proceeds of such sale upon proper claim and proof of the same before an auditor or otherwise, as in other cases after payment of costs, etc."

The claim for payment of taxes in this case has not been properly made under this act, and the certificate now in possession of the sheriff by the county commis-

YORK LEGAL RECORD.

VOL. IV. THURSDAY, FEBRUARY 28, 1884. No 52.

sioners under their official seal is that there was no lien for taxes filed or of record in their office against the real estate sold by the sheriff as the property of Morris Cooper, the defendant, at the time of said sale on April 7, 1883. The tax claimed cannot therefore be paid out of the proceeds of such sale now in the hands of the sheriff.

Having seen that the claim of the defendant cannot be sustained, and that the tax claim is without foundation, it follows that the balance now in the hands of the sheriff should be applied towards the payment of the judgment of Weaver *et al.*

We therefore discharge the rule, and direct the sheriff to apply the balance in his hands as above stated in part payment of the judgment of Weaver *et al.*, to August term, 1878, No. 266.

Rule discharged and order made.

York County v. Reeser.

Re-audit of 1872—Effect of appeal—Striking off judgment.

Under the provisions of the Act of 1872, the County Re-auditors reported an indebtedness on the part of the defendant and his colleagues, Commissioners of York county of $3,0:9.20. This report was filed in the Prothonotary's office. and judgment for that amount entered against defendant and his colleagues. Defendant appealed from this report, but the appeal was never prosecuted. A scire facias was issued on the judgment, and after the lapse of five years the defendant filed his petition praying the Court to quash the scire facias and strike off the report of the Re-auditors. HELD, That the petition must be dismissed.

The defendant having appealed from the report, has himself brought it into Court for adjudication.

There may be matter for judicial investigation, and this can only be determined upon the hearing of the appeal, upon an issue properly presented to the Court.

Petition to quash scire facias and strike off report.

W. C. Chapman for petition.

Levi Maish, contra.

To the Honorable Judges of the Court of Common Pleas of York County.

The petition of William Reeser the above defendant respectfully represents

That he was one of the Commissioners of said county, from the 10th of November, 1864, to the year 1867, duly elected and qualified, and that he took upon himself the said office and acted as such for and during his full term. That the duly elected Auditors of the county in each and every year of his said term, duly did audit, settle and adjust the accounts of the board of Commissioners of which he was a member, and in due form made their report thereof to the Court of Common Pleas of the said county, and in each and every of the said years from 1864 to the expiration of his said term of office the said Commissioners did fully, fairly and honestly submit to the said County Auditors all the accounts of the county in the business transacted by them and the several reports of the said Auditors were filed among the records of the Court of Common Pleas of said county; and although the right of appeal from the reports aforesaid was given by law within 60 days, yet no appeals were ever taken from the reports of the Auditors so filed as aforesaid; and your petitioner avers that in none of the said Auditors' reports was he your petitioner ever charged with being indebted to the county of York one cent.

Your petitioner further shows that although the County Auditors' reports of the settlements of his accounts as Commissioner for 1864, remained unappealed from for eight years; those for 1865 for seven years; those for 1866 for six years; yet under the provision of the Acts of Assembly of March 6, 1872, and April 3, 1872, Messrs. Cochran, Maish and Wallace were appointed to re audit said accounts, who filed their report as such re-auditors, January 2, 1873, entered 284 November Term, 1872, in the said Court in which your petitioner and Henry Miller and John E. Anstine, his colleagues, are charged with an indebtedness to said county of $3019.20. He further shows that from said report and the entry of the same in said court he took his appeal according to law, which was duly entered in said Court to No. 67 April Term, 1873;

and that on said report although appealed from, the aforesaid scire facias was issued to number 59 January Term, 1878, on the 20th day of December, 1876, and that the said scire facias has not since been prosecuted, and nothing further been done in the case, and that more than five years have since elapsed since the issuing of the said scire facias. He further shows that the records of said Court are still encumbered with said report of the re auditors, showing an apparent lien on his real estate, to his great damage and detriment and seriously impairing his credit.

Wherefore he prays that this petition may be permitted to be filed as an amendment to his affidavit, filed in said Court, January 7th, 1878, and that the facts stated herein may be considered and treated as the further ground of his prayer in said affidavit.

And further that the prayer of said petitioner contained in said affidavit that the Court should quash the above mentioned writ of scire facias, may be permitted to be enlarged so that he may add the prayer that the Court will strike off the said report of the re-auditors, entered as aforesaid to 284 November Term, 1872, as filed and entered against him under the authority of the said acts of 1871; the said acts being unconstitutional and void.

And he will pray, &c.

WILLIAM REESER.

W. C. Chapman, for petition.

Levi Maish, contra.

November 5, 1883, GIBSON, A. L. J.—Having expressed the opinion, that on account of the appeal taken, from the report of the re-auditors and entered in this court, the court cannot summarily strike off the report, but that all questions touching its validity must be tried on an issue, I was requested to reduce my reasons to writing.

1st. There is nothing to bring before the court the cognizance of the report except the appeal. The 4th Section of the Act of the 6th of March, 1872, directs the re-auditors to file their report in the office of the prothonotary, without any order of the court being required for that purpose, and there was no order of the court in the premises. Such order has been held to be requisite in county auditors' reports: Lan. Co. v. Slocum, 4 Leg. Op. 473; Com. v. Hoffman, 24 P. F. S. 105. If, therefore, the filing of the re-auditors report has any effect as a judgment at all, it is only by virtue of its entry under the authority of the Legislature, if it had such authority. If the judgment had so remained, as in the case of judgments otherwise entered by the prothonotary, a motion to strike it off might have been sustained. But the petitioner appealed from the report of the re-auditors, and that appeal is entered in the Common Pleas docket to April, 1873, No. 67. The petitioner has therefore brought the report before the court for adjudication.

2nd. There may be matter for judicial investigation under the Act of March 6, 1872, because it has been held that the action of county auditors in reviewing accounts of county officers is not judicial in its character: Burns v. Clarion Co., 12 P. F. S. 422. It was there held that the Legislature have the power to open the settlement of county officers accounts and readjust and resettle them, when the purpose is expressed "to resettle and equitably adjust the same." The preamble of the Act of March 6, 1872, expresses the purpose of the act in these words: "That all persons who have dishonestly or unlawfully used or applied to their own use the public funds of said county, should be compelled to reckon for the same and to repay the amount with interest." That such is not the case here can only be shown under the appeal. An issue may therefore be directed.

QUARTER SESSIONS.

Q. S. of Chester Co.

Commonwealth v. Neeley.

Criminal Law—Former Conviction or Acquittal—When a bar to subsequent indictment—Greater and less offence.

A former conviction or acquittal for a greater offence is a bar to a subsequent indictment for a minor offence included in the former; and whenever, under the indictment for the greater, there could be a conviction on the less, a conviction or acquittal of the minor offense will bar a subsequent prosecution for the greater.

A conviction of fornication and bastardy, held to bar a subsequent prosecution for the same acts under an indictment for adultery.

Sur plea of former conviction.

The facts of the case appear by the opinion of the Court.

January 28, 1884. FUTHEY, P.J. The defendant was indicted at April Sessions, 1883, in separate bills for "fornication and bastardy," and for "adultery and bastardy;" he was tried on the indictment for fornication and bastardy and was convicted and sentenced. The Commonwealth then arranged the defendant on the indictment for adultery and bastardy, to which he pleaded that he had been already convicted and sentenced for the same offence.

It is conceded by the Commonwealth that the illicit carnal connection charged in both indictments is the same, and the question therefore presented is, whether, where a defendant is convicted and sentenced for the offence of fornication, he can be afterwards tried on an indictment charging him with the same unlawful act as adultery, he being a married man.

It is a rule than an acquittal or conviction on an indictment for a minor offense is generally no bar to a subsequent indictment for a greater, and the works on criminal law show the application of this rule. Thus, a conviction for assault with intent to kill, would be no bar to an indictment for murder, and an acquittal for larceny would not prevent a prosecution for burglary with intent to steal.

An acquittal or conviction, however, for a greater offence is a bar to a subsequent indictment for a minor offence included in the former, wherever under the indictment for the greater offence the defendant could have been convicted of the less; and if on the trial of the major offence there can be a conviction of the minor, then a former conviction or acquittal of the minor, will bar the major. And where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of autrefois acquit or autrefois convict is generally good; 1 Wharton on Criminal Law, sec. 560-565. An acquittal for voluntary manslaughter is a bar to a future prosecution for murder, and where a man is at the same time guilty of an assault and of a battery on the same person, the acquittal in one case is a bar to the other.

In the case before us, had the defendant been tried in the first instance on the indictment for adultery, he could, on such trial, have been convicted of fornication. If a trial were now permitted to be had on the indictment for adultery, he could, in like manner, be convicted of fornication, and thus we would have two convictions for the same offence, the one already had on the indictment for fornication and another on the indictment for adultery. The evidence necessary to support an indictment for adultery, is sufficient to warrant a legal conviction of fornication.

Illicit carnal intercourse is called by different names, according to the circumstances which attend it. It may be seduction, incest, adultery, fornication and bastardy, or simple fornication, but the body of all these offences is the illicit connection. In each case, the essential fact which constitutes the crime is such connection, and, on a trial for either of these offences, the defendant may be convicted of fornication; Dinker *v.* Commonwealth, 5 Harris 126.

For the latter offence the defendant has been convicted and sentenced. He cannot be again placed on trial for the commission of the same criminal act, called by another name.

The plea is sustained.

Roads in Windsor Township.

Viewers—Similarity of Names—Who intended.

The Court appointed Jacob Tyson as a reviewer. Jacob F. Tyson acted in that capacity. HELD, That as there was a Jacob Tyson residing in a neighboring township and there is nothing to show who was intended, the report should be set aside, and an alias review granted.

Exceptions to report of reviewers.

E. W. Spangler for exceptions.

Levi Maish for report.

February 28, 1884, WICKES, P.J. Jacob Tyson was appointed a reviewer and Jacob F. Tyson acted. The evidence shows that there is a Jacob Tyson, a cousin of Jacob F., residing in a neighboring township, and we are not able to say who is intended. Under such circumstances the only safe plan is to set aside the report and grant an *alias* review under the provisions of the act February 23, 1870, P. L. 228. And now to-wit: February 28, 1884, we sustain the seventh exception, set aside this report, award an *alias* review, and appoint Frank J. McGee, of Wrightsville; Jacob Sitler, of East Prospect borough, and Daniel Anstine, of Windsor township.

VALEDICTORY.

Four years ago the YORK LEGAL RECORD was launched upon the legal fraternity, and from the cordial welcome which it received at the hands of the Bar, the publisher had reason to believe that it future prosperity was assured. Under the Rules of Court, adopted by the Bench, a liberal construction of which was expected, nearly all legal advertisements were to be inserted in its columns, and the expenses of publication liquidated in this manner.

A number of the Bar put the construction on the rules that was expected by the Court and the publisher, and which was the manner in which the same rule was interpreted in Lancaster; but a majority only inserted the advertisements that came within its letter, and thus at the very beginning of its existence the perpetuity of the RECORD was threatened by those who should have been its most earnest supporters.

The number of audits and other advertisements connected with assigned estates sustained the RECORD the first year in a substantial manner, but during the second year these declined, while the friends of the RECORD were hardly justified in standing alone as attorneys who required more advertising and made the expense of settling estates larger than others. As a natural result the income materially decreased, and the second year of its existence left but a small margin for the labors of the publisher.

For the last two years the RECORD has been run at a loss. Frequent appeals were made to the Bar in its behalf, the last of which was the signing of a petition for a more stringent and comprehensive Rule. This measure would have saved the RECORD, and we had no doubt as to the power of the court to adopt it; but it has thought otherwise. However much pride we felt in the publication of the RECORD, and a feeling of regret that York county could not compete with counties like Delaware in the publication of a legal journal, we have no desire to pose as a benefactor of the Bar. If our journal is no longer desired, we will cease inflicting it upon any one and give room for something else, or see the decisions of our court and the learning of our Bar sink back to their former position, unpublished and unknown outside our own precincts.

To those members of the Bar who have supported us from the beginning, we return our sincere thanks—the others we forgive. If in the future any enterprising genius makes a second attempt to publish a law journal, we hope he may be successful, and that the aid that was withheld from us will be extended to him. Perhaps the absence of the RECORD, with its conveniences and benefits, will cause it to be regretted by those who "cared for none of those things" during its lifetime.

An index and table of cases will be published in a short time, thus completing the fourth volume. With that work our labors as editor and publisher of a legal journal will close, and the RECORD will have reached

THE END.

INDEX

OF CASES REPORTED IN THIS VOLUME.

2. The plaintiff knew, or was bound to know, when the annual dues were payable, and the usage of the company, and his reliance of receiving such notice, are no excuse for non-payment.—*Ib.*

3. The declarations made by the agents could not add to the original contract a condition to the effect that if he did not get notice he need not pay.—*Ib.*

4. A Mutual Life Insurance company is under no obligation to give notice to its members of the time of payment of premiums or annual dues.—*Ib.*

BENEFICIARIES.

5. Where it appears from the by-laws of a beneficial association that its object was to perpetuate a fund for the relief of the widows and orphans of its members, the words heirs and legal representatives, as used in its by-laws, and the certificate of insurance issued by it, are construed to mean children.—*Meyer's Estate*, 166.

6. The Odd Fellows' Endowment Association issued a certificate of life insurance to J., which provided that the amount which would become due thereon at his death should be paid to his wife E or her legal representatives. She having died prior to her husband, leaving two children to survive her and he having remarried and left his second wife to survive him. HELD, that the children were entitled to the fund.—*Ib.*

CONSTRUCTION OF.

7. Ambiguous words in a policy of insurance will be construed most favorably to the insured. —*Burkhard v. Traveler's Ins. Co. of Hartford, Connecticut*, 147.

8. Stepping off the platform of a car through a hole left in the floor of a bridge for repairs, is not a "voluntary exposure to unnecessary danger" within the meaning of an accident insurance policy, when the train had stopped on the bridge on a dark night, and the hole was not visible, and the assured had no notice of or reason to apprehend such danger. Exposure to a hidden danger without any knowledge of it does not constitute a voluntary exposure to it.—*Ib.*

9. Neither does such an act violate the condition of the policy against "walking or being on the roadbed or bridge of any railway." The intent of this language is to exempt from responsibility for injuries to the assured from trains moving thereon, and not to avoid liability for injuries resulting from being on bridges unsafe in themselves.—*Ib.*

10. In the certificate of life insurance in suit, the company covenanted and agreed in consideration of certain payments and assessments, "at the expiration of sixty-days after proof of the death of Jacob W. Leidig to pay or cause to be paid unto Susan Leidig his wife, or their heirs and legal representatives the sum of three ($3.00) dollars for every $1,000 the maximum sum of benefit actually in force in this association upon the decease of the said Jacob Leidig, and upon which the mortuary assessments are paid; provided the amount so paid shall not exceed the maximum sum of three thousand dollars." HELD, by the Court below and affirmed by the Supreme Court that the burden of proof was not upon the plaintiff, but upon the defendant, to show, that there were "$1,000 maximum sums of benefits actually in force in the defendant company upon the decease of the insured and upon which mortuary assessments are paid. —*Susan Leidig v. The New Era Life Association of 1876, of Philadelphia, Pa.*, 135.

11. It was for the jury to determine whether the applicant had "read or heard read all the answers in the application."—*Ib.*

EVIDENCE.

12. In a suit on a policy of insurance in a Mutual Aid Association, plaintiff proved notice to defendant to produce the application on which said policy was issued. Defendant failed to do so, alleging that the application was part of the records of another case, which was now before the Supreme Court. HELD, affirming the Court below, that the policy must be admitted in evidence, notwithstanding the absence of the application.—*Fidelity Mutual Aid Association v. Leidig*, 37.

13. The President of the Association in a letter written to the plaintiff's attorney stated that they did not "contest the claim, nor refuse to pay it up to this time, but prefer to await developments," and defer payment until another suit now pending against the companies on the same loss had been determined. HELD, affirming the Court below to be a distinct admission of notice of the loss, and waiver of proof otherwise necessary.—*Ib.*

JURISDICTION. See JUSTICE OF THE PEACE, 10.

14. Suit may be brought in the county where the subject of the risk insured against was domiciled or located, and the summons may be served on the company in any other county of the Commonwealth in the manner provided by the original Act of April 24th, 1857.—*Spangler v. The Pennsylvania Mutual Aid Society*, 33, *and Quinn v. Fidelity Beneficial Society*, 34.

15. The Acts of April 24, 1857, and April 8, 1858, refer to actions commenced in courts of record only.—*Fidelity & Casualty Co. v. Hesly*, 89

16. A. was insured in York in the defendant company, which had its office in Lehigh county. Afterward, she assigned the insurance to B., then moved to Baltimore and died there. B brought suit against the defendant company in York county, the writ being directed to the Sheriff of Lehigh county, and by him served on the defendant.—HELD that the service must be set aside.—*Spangler v. Keystone Mutual Benefit Association*, 73.

17. The Act of 1857 permits suit to be brought in the county where the property insured is located; this is a tantamount to saying where the property insured is destroyed. The place where the loss occurs determines the jurisdiction, for then only does the right of action accrue. So in life insurance, the place of death is the place of loss, and the suit must be brought in that forum.—*Ib.*

RIGHT TO SUE.

18. Where insurance companies have paid losses upon property destroyed by fire through the alleged negligence of a third party they may bring suit against the wrong-doer, in the name of the assured, without his consent, and the assured cannot prevent such use of his name, or, by a release to the defendant, defeat the action. —*Kennebec Ice and Coal Co. v. Wilmington and Northern R. R. Co.*, 59.

19. In such case the insurers are not obliged to wait the pleasure of the assured whether he will bring suit.—*Ib.*